Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1327

THE BOEING COMPANY

(formerly The Boeing Airplane Company), *et al.*,

Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE BOEING COMPANY

(formerly The Boeing Airplane Company), *et al.*,

Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment entered on December 21, 1978, by the United States Court of Appeals for the Second Circuit, sitting *en banc*, reversing the decision of a panel of that court, and affirming a judgment of the United States District Court for the Southern District of New York which, in class action litigation, vastly alters the American Rule on attorneys' fees defined by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

The Court of Appeals established, as a matter of federal law, that prevailing class action attorneys are to be paid attorneys' fees not only from money actually claimed by class members in the litigation, but also from money that belongs to others because it has not been claimed by the class.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit *en banc,* filed December 21, 1978 has not yet been officially reported and is set forth as Appendix A hereto. The opinion of the panel, reported at 573 F.2d 733 (2d Cir. 1978) (*"Van Gemert III"*) is set forth as Appendix B hereto. The orders of the District Court dated June 30 and September 22, 1977 which were affirmed by the Court of Appeals *en banc* are set forth as Appendix C hereto. The opinions of the Second Circuit on the previous appeals in this action are reported at 553 F.2d 812 (2d Cir. 1977) (*"Van Gemert II"*) set forth as Appendix D hereto, and 520 F.2d 1373 (2d Cir.), *cert. denied,* 423 U.S. 947 (1975) (*"Van Gemert I"*) set forth as Appendix E hereto. None of the other opinions of the District Court other than its opinion certifying the action as a class action, 259 F. Supp. 125 (S.D.N.Y. 1966), has ever been reported.

Jurisdiction

The judgment of the Court of Appeals *en banc* was entered on December 21, 1978. No petition for rehearing was filed. The mandate of the Court of Appeals was stayed by order dated February 23, 1979, pending filing of this petition for certiorari. The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

Statutes Involved

62 Stat. 955, 28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;

> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

68 Stat. 253, 28 U.S.C. § 1923 provides:

> (a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
>
> $20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;
>
> $20 in admiralty appeals involving not over $1,000;
>
> $50 in admiralty appeals involving not over $5,000;
>
> $100 in admiralty appeals involving more than $5,000;
>
> $5 on discontinuance of a civil action;
>
> $5 on motion for judgment and other proceedings on recognizances;
>
> $2.50 for each deposition admitted in evidence.
>
> (b) The docket fees of United States attorneys shall be paid to the clerk of court and by him paid into the Treasury.
>
> (c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:

$25 where the amount involved is not over $1,000;
$50 where the amount involved is not over $5,000;
$75 where the amount involved is over $5,000.

Question Presented

Does the American Rule on attorneys' fees, as defined in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), permit an award of attorneys' fees in class actions to prevailing class action attorneys which award of fees is taken not only from money actually claimed by class members, but also from money that belongs to others?

Statement of the Case*

Respondents are a class of holders of bearer debentures of the petitioner Boeing Company ("Boeing") who, when Boeing called for redemption of the debentures, failed to convert them before the expiration of the conversion privilege.** After trial on both federal securities law and state law claims, the District Court held that Boeing had given all the notice required by the contract under which the debentures were sold and hence was not liable for the debentureholders' failure to convert. While the Court of Appeals in *Van Gemert I* agreed that Boeing had given all notice required by this contract, it held that Boeing should have given even more notice because the debentureholders

* A more detailed procedural history may be found in the panel and *en banc* opinions of the Court of Appeals (Appendices A and B).

** At the time of the call for redemption, the two shares of Boeing stock into which each $100 in principal amount of debentures was convertible were worth $316.25. The redemption value of the debentures was $103.25. Hence, holders who failed to convert on time lost $213 in value for each $100 in principal amount of debentures. 3a, 40a.

had an implied right to expect it. 73a. The Court of Appeals did not find that Boeing had engaged in any fraud or even that it had made any money as a result of its failure to convert late-tendered debentures. Boeing was merely held liable for the profit that the debentureholders could have made if they had converted and sold the common stock at prevailing market prices. 77a.

On remand, the District Court fixed damages without awarding interest and set the method of calculating attorneys' fees. The respondents appealed again, arguing, in relevant part, that class members filing claims for damages should be allowed to divide among themselves all damages remaining unclaimed, if only for the purpose of paying attorneys' fees. However, the Court of Appeals in *Van Gemert II* held that claiming class members had no right to unclaimed damages for any purpose, including paying attorneys' fees in whole or in part, because any such award would constitute a fluid class recovery or one benefitting a "next best class" contrary to *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974). 51a-52a.

On remand from *Van Gemert II,* Boeing deposited the damages and interest, which today amount to over $6,500,000, in a fund held by the Chase Manhattan Bank to be disbursed under the auspices of a Special Master, as directed by the District Court.* 41a-42a. The District Court also held that even though claiming class members could not directly invade the sums remaining unclaimed in order to pay their attorneys' fees, as *Van Gemert II* had held, these funds could be used on a pro rata basis to pay the attorneys' fees of the class. 40a-41a. It was and is undisputed that all

* Claims totalling approximately $2,000,000 have been filed to date.

money remaining unclaimed does not belong to the class.* *Van Gemert II, supra,* at 51a-52a.

In *Van Gemert III,* a panel of the Court of Appeals reversed, holding that under the American Rule on attorneys' fees, as defined by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), attorneys' fees could be taken only from the shares of those class members who made a claim for them and received a benefit from their attorneys' actions. Because the unclaimed money belonged to others for whose benefit the litigation had not been brought, attorneys' fees could not be charged against it. 29a, 33a-34a.

The Court of Appeals *en banc,* however, affirmed the District Court and by a divided vote held that class action attorneys could be paid fees not only from money actually claimed by class members, but also from money that did not belong to the class because it was never claimed.** 3a. Three grounds were stated for the decision.

First, a contrary decision would be inequitable to claiming class members and their lawyers "without any corresponding benefit to absentees". 3a. Since the unclaimed money, irrespective of ownership, is nevertheless "the spoils of . . . victory," those "spoils" could be used to pay attorneys' fees. 11a n.14.

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* Petitioner believes any unclaimed portions should be returned to it. New York State also asserted in a brief *amicus curiae* to the Court of Appeals *en banc* that unclaimed funds belong to it by virtue of their deposit in a New York bank.

** In its order granting review *en banc,* the Court of Appeals also asked the parties whether it was bound by *Van Gemert II* and the law of the case doctrine. In a footnote and contrary to decisions in two other Circuits the Court of Appeals held that it was not so bound. 6a n.9.

Second, a contrary decision would not be "sound policy" because it would "place enormous pressure on attorneys [for a class] to settle." 3a.

Third, "long-standing precedent" is said to support the decision. 3a. This precedent consists of but two cases, neither of which dealt with the issue before this Court and both of which were *explicitly* disavowed by this Court insofar as they might be construed to address this issue in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 257-58 & n.30 (1975).

The three dissenting judges stated that the majority had "allowed [its] enthusiasm for class litigation to lead them into approving an award to attorneys that cannot be justified." 17a. The minority saw nothing in the case which "justifie[d] an award of substantial fees to lawyers for work purportedly performed on behalf of persons who are not their clients and who, themselves, have not received a single penny as a result of the lawyers' efforts." *Id.*

Reasons for Granting the Writ

There are two reasons why a writ of certiorari should issue to review the decision of the Court of Appeals for the Second Circuit. First, the decision of the Court of Appeals is contrary to the decision of this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). *Alyeska* restated and defined a corollary to the American Rule on attorneys' fees, that in certain instances under 28 U.S.C. §§ 1920 and 1923 attorneys' fees may be borne by parties who are intended to be and actually are benefited by the efforts of the prevailing attorneys. The Court of Appeals decision destroys that holding as it relates to class actions by imposing such fees on non-beneficiaries of the lawsuit. This Court has consistently rejected, and repeat-

edly admonished against, attempts to alter established principles of law in connection with class action litigation, and the Court of Appeals decision substantially cuts away from those holdings. *See, e.g., Oppenheimer Fund, Inc.* v. *Sanders,* 98 S. Ct. 2380 (1978); *Gardner* v. *Westinghouse Broadcasting Co.,* 98 S. Ct. 2451 (1978); *Coopers & Lybrand* v. *Livesay,* 98 S. Ct. 2454, 2459, 2462 (1978); *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 176 (1974).

Second, a writ of certiorari should issue because, as the Court of Appeals *en banc* stated, this case is unusually "[significant] . . . for the conduct of class action litigation." 6a. A decision which enlarges so substantially the source from which class action attorneys' fees can be drawn, and which specifically denies that the size of that source should depend on whether class members care enough about the lawsuit to claim damages, will both encourage the bringing of lawsuits "not likely to benefit anyone but the lawyers who bring them," *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 567 (2d Cir. 1968), and will encourage the continuation of such suits even after class members have lost interest in them. Indeed, the Court of Appeals admits that it is "structur[ing]" class action fee awards so that class action lawyers will not "be tempted to consider settling . . . for less than adequate sums." 16a-17a. In the short time since the Court of Appeals decision was filed, a case in which another court must decide whether to apply its rationale has already arisen. *American Timber & Trading Co.* v. *First National Bank,* Civ. No. 70-687 (D. Oregon).

POINT I

The Decision of the Court of Appeals Is Contrary to This Court's Decision in *Alyeska Pipeline Service Co. v. Wilderness Society.*

In *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 247 (1975), this Court stated:

> "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the losers. We are asked to fashion a far-reaching exception to this 'American Rule'; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals."

The statement could serve for this case as well. By holding that the attorneys for a class may receive their fees from claimed as well as unclaimed portions of a class action judgment, the Court of Appeals has directed that the legal fees of the victorious class be paid by some other person, *i.e.*, out of property that does not belong to the class. The Court did so by altering, for the benefit of class action lawyers, the American Rule and the "common benefit" corollary thereto.

This "common benefit" doctrine holds that in certain instances the financial burden of a lawsuit may be spread among unnamed parties for whose benefit the suit was brought *and* who were actually enriched by the results obtained. The early cases of *Trustees* v. *Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co.* v. *Pettus,* 113 U.S. 116 (1885) are illustrative. In *Greenough,*

one beneficiary of a trust fund recovered assets which he and eleven other identifiable beneficiaries of the fund equally shared. In *Pettus,* one creditor established a lien on certain assets of a debtor, to the benefit of himself and a number of other creditors. In *Pettus,* this Court held that the attorneys' fee would be taken only from "the amount of all claims filed" against the assets on which the plaintiffs had established a lien. 113 U.S. at 127. Thus, attorneys' fees were taken only from the property of those who were actually enriched by the action.

In *Alyeska,* this Court set forth the unifying characteristics of cases falling within the common benefit doctrine: first, the classes of beneficiaries should be "small in number and easily identifiable"; second, the benefits should be able to be "traced with some accuracy"; and third, there should be "reason for confidence that the costs [can] indeed be shifted with some exactitude to those benefiting." 421 U.S. at 264 n.39.

In this case, it is not disputed that unclaimed portions of the judgment do not belong either to the class as a whole or to those members of the class who in fact file proofs of claim. *Van Gemert II, supra,* at 51a-52a; *Eisen* v. *Carlisle & Jacquelin, supra,* 479 F.2d at 1018.*

Nonetheless, the Court of Appeals held that attorneys' fees for class lawyers can be taken from these unclaimed funds. As a result, costs *will not* be imposed "with some exactitude" on those who benefit from this class action as *Alyeska* requires. Instead these costs will be extracted from the property of others. The Court of Appeals attempts to avoid this conclusion by ignoring those who will own the

* This unclaimed money belongs either to Boeing, the loser in this litigation, or to one or more state governments under theories of abandoned property. The Court of Appeals expressly declined to determine ownership of any unclaimed funds. 14a n.17.

property when the time for making claims on the fund expires and by creating a "benefit" in non-claiming members of the class solely for the purpose of assessing attorneys' fees. This "benefit" consists of no more than an "interest" in the class recovery which is never realized and which vanishes entirely after attorneys' fees are calculated.* 11a-12a. Even the generalized interest in protecting the environment which this Court found an insufficient benefit in *Alyeska* is far more real than this chimera.

The Court of Appeals relied principally on *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), a case which was extensively argued to this Court in *Alyeska* by the respondents and *amici curiae,*** and was *expressly* limited in *Alyeska* insofar as *Sprague* suggests a view of the common benefit exception which is broad enough to justify imposing attorneys' fees on the property of a loser or other non-beneficiary of the litigation. 421 U.S. at 257-58 & n.30. As this Court stated in rejecting the argument that *Sprague* supported such a broad definition of the common benefit doctrine:

> *"Sprague* . . . might be read as suggesting that the Court in *Greenough* said that a federal court could tax [attorneys' fees] against the losing party . . . . But any such suggestion is without support either in the opinion in *Greenough,* which is limited to a common-fund rationale, or in [any federal] statute."

* The Court of Appeals also evaded the requirements of *Alyeska* that the beneficiaries be "easily identifiable" and traceable "with some accuracy," by tracing, not the many unknown and unfound debentureholders, but the debentures themselves, as if these numbered pieces of paper reaped the benefits of this action. 10a-11a.

** *See* Brief for Respondents at 3, 4, 36, 37, 38, 72, 81, 88-89, Brief of the Lawyers' Committee for Civil Rights Under Law *Amicus Curiae* at 5, 9, 10, 11.

Sprague holds only that because the plaintiff had established the indefeasible right of fourteen other trust funds as well as her own to certain assets of a bank, she could obtain attorneys' fees from these assets. The Court was not faced with the claim that attorneys' fees should be taken from property that had been determined not to belong to beneficiaries of the litigation.

Trustees v. *Greenough, supra,* the only other case relied on by the Court of Appeals, is still further from the mark. While this Court noted in *Greenough* that not all of the bondholder beneficiaries of the litigation had yet redeemed their bonds, an indefeasible right to a redemption for full value had been created which could be exercised at any time. 105 U.S. at 531. Thus an assessment of attorneys' fees on the entire fund was sure to be spread proportionately among all those who had concretely benefited from the lawsuit. The "favorable decree [had given] them all a proportionate advantage." 105 U.S. at 534. As this Court noted in *Alyeska,* the idea that attorneys' fees can be taken from one who is not enriched by the litigation "conflicts with any fair reading of *Greenough.*" 421 U.S. at 258 n.30.

The decision of the Court of Appeals, imposing attorneys' fees on property which does not belong to the class, is directly contrary to this Court's holding in *Alyeska.*

POINT II

The Decision of the Court of Appeals Will Significantly Affect the Conduct of Class Action Litigation by Allowing Class Action Attorneys to Collect Fees Which Are Disproportionate to the Benefits Actually Conferred.

Behind the Court of Appeals decision that attorneys' fees in a class action may be paid from portions of a judgment which are unclaimed and thus do not benefit any

class member, is the explicit premise that to do otherwise would be inequitable and unsound policy because class members would receive less money and class attorneys would be induced to settle cases in which few claims were expected. 3a, 16a-17a. Petitioner submits that the more important policy against abuse of the class action device that has been recognized by this Court was not considered by the Court of Appeals.

Rule 23 of the Federal Rules of Civil Procedure creates several special rules that make class actions different from other litigation. This Court has held, however, that outside those special rules class actions are governed "by the same standards that govern . . . other types of litigation." *Coopers & Lybrand* v. *Livesay,* 98 S. Ct. 2454, 2459 (1978). One of those standards is the requirement in any action for damages that a plaintiff be willing to aver that he seeks compensation before that compensation will be paid to him. *See, e.g., Decker* v. *Fillis,* 306 F. Supp. 613, 615-16 (D. Utah 1969). Rule 23 merely defers to the end of a case the requirement that, before any party receives damages, he be willing to prove his entitlement to them. This is done in order to allow entry into court of those willing to claim injury but not to undertake alone the expense of proving it.*

Once injury has been proven, the differences between class actions under Rule 23 and ordinary actions comes to an end. Each class member, like any other injured party, must come to court and make claims for damages in order to be paid. *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1010 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974). This is not a burden on a class member who feels his injury sufficiently to seek compensation for it.

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* Expenses of instituting an action and notifying the class of the existence of the litigation must of course be borne by the class. *Oppenheimer Fund Inc.* v. *Sanders,* 98 S. Ct. 2380 (1978).

Thus, a rule which compensates class attorneys on the basis of the number of class members who feel sufficiently injured to step forward brings into balance the benefits actually accorded with legal fees actually paid.

On the other hand, if class action attorneys are compensated, as the Court of Appeals held they must be, on the basis of the maximum possible award to the class, irrespective of whether or not anyone in the class actually receives any such benefits, these attorneys could be richly rewarded for establishing technical legal violations without regard to the possibility that any actual benefit will be conferred. *See In re Hotel Telephone Charges,* 500 F.2d 86, 91 (9th Cir. 1974). Indeed, under the Court of Appeals decision, maximum incentive would be given to such attorneys seeking such rewards. To reduce this potential, legal fees should be proportionate to benefits actually received by the class.

Further, if fees to the class' attorneys are awarded irrespective of the amounts actually claimed by the class for whose benefit the action is initially brought, there will be no incentive for such attorneys to play any role in seeking out their clients. If class attorneys may rely on being compensated on the basis of a theoretical maximum without regard to actual benefits conferred, they will have little incentive to expend much effort in locating class members. The most vigorous representation of the interests of the entire class could cease just at the time when such representation becomes most important.

The new rule of the Court of Appeals will also render more difficult the settlement of class actions because plaintiffs' attorneys will insist upon compensation for themselves based on the full fund claimed, even if it is agreed that a fair settlement for claiming class members is a much smaller amount. Thus a wider gap will be created between

what is sought by class plaintiffs and what defendants are willing to proffer. No public purpose other than enrichment of attorneys can possibly result from such a development.

It is submitted that the Court of Appeals decision in this case will ensure the proliferation of class action litigation by compensating attorneys far beyond any benefits in fact conferred by their efforts. The decision will also ensure protraction of these actions by class attorneys even when the class they represent has lost interest in the case. The importance to all class action litigation and of the issue raised by the Court of Appeals merits authoritative disposition by this Court.

CONCLUSION

Both because of the important effect of this decision on class action litigation, and because the decision is contrary to the common benefit exception to the American Rule on attorneys' fees as set forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals (*en banc*).

Dated: New York, New York
February 26, 1979

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 551—September Term, 1977.

(Submitted August 18, 1978 Decided December 21, 1978.)

Docket No. 77-7547

En Banc

WILLIAM R. VAN GEMERT, *et al.*,

Plaintiffs-Appellees,

—v.—

THE BOEING COMPANY
(formerly The Boeing Airplane Company), *et al.*,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,*
FEINBERG, MANSFIELD, MULLIGAN, OAKES,
TIMBERS, GURFEIN, VAN GRAAFEILAND and
MESKILL, *Circuit Judges.*

Appeals from an order entered in the United States District Court for the Southern District of New York, Sylvester J. Ryan, *J.*, awarding counsel fees, expenses and disbursements to be paid from the total amount of a class action judgment. Following a decision by a panel of this

court, 573 F.2d 733 (2d Cir. 1978), the court granted a rehearing *en banc*.

The order of the district court is affirmed.

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IRVING STEINMAN, New York, New York,

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GEORGE J. SOLLEDER, JR., Special Master, New York, New York, *amicus curiae.*

KAUFMAN, *Chief Judge*:

Attorneys litigating class actions have been variously described as "economically rational entrepreneurs," champions of aggrieved individuals for whom a conventional lawsuit would not be feasible, and the recipients of a "golden harvest of fees." These diverse perspectives, how-

ever, are united by a common theme of which we are not unaware. The conduct of class action litigation is affected by the principles governing the compensation of the attorneys who bring them.

Today we decide, in a case of first impression, that the fees and costs of counsel may be assessed against the unclaimed portion of a class action judgment. Our conclusion is predicated on considerations of equity and sound policy and is sustained as well by longstanding precedent. To hold otherwise, we believe, would engender serious unfairness to claiming class members and their lawyers, without any corresponding benefit to absentees. Moreover, a contrary result would place enormous pressure on attorneys to settle at all costs, and would deter them from instituting meritorious suits.

I.

In February 1966, the Boeing Company decided to call for redemption its issue of 4½% Converted Subordinated Debentures, due July 1, 1980. Pursuant to the terms of the Indenture Agreement, Boeing published notices of its intention in two national newspapers. Boeing also mailed notices to those investors who had registered their debentures. Holders of $1,544,300 of unregistered debentures, however, did not learn of the call until after the conversion deadline of midnight, March 29, 1966, set by Boeing.

At the stroke of twelve their right to convert $100 in principal of bonds into two shares of common stock expired. The two shares were worth $316.25 that day, but the unwitting bondholders were left only with the small consolation of having the right to redeem for $103.25, a figure fixed in the Indenture.

William Van Gemert and several other nonconverting bondholders brought a class action against Boeing, alleg-

ing that they had received inadequate and unreasonable notice of Boeing's decision. The plaintiffs contended that Boeing was civilly liable under the Securities Exchange Act of 1934,[1] the Securities Act of 1933,[2] the Trust Indenture Act of 1939,[3] and New York law.[4]

After a full trial, Judge Ryan dismissed the complaint, having held that Boeing was required to do no more than fulfill notice requirements stated in the Trust Indenture Agreement. On appeal, we decided that the New York law of contracts imposed an implied duty on Boeing—not satisfied by its newspaper advertisements and "eleventh hour" news release—to provide reasonable notice of its intention to redeem the debentures. Accordingly, we held that Boeing was liable despite its compliance with the notice provisions of the Indenture Agreement and remanded the case to Judge Ryan for a determination of damages. *Van Gemert* v. *Boeing Co.*, 520 F.2d 1373, 1383 (2d Cir. 1975) [*Van Gemert* I].

Judge Ryan then proceeded to calculate damages based on the difference between the redemption price of the debentures and the value, as of March 29, 1966, of the shares of common stock into which they could have been converted. We affirmed this ruling, but held, contrary to Judge Ryan, that the plaintiffs were entitled to prejudgment interest. *Van Gemert* v. *Boeing Co.*, 553 F.2d 812, 813 (2d

1 15 U.S.C. § 78f. The plaintiffs contended that Boeing was liable under the Act for violating the New York Stock Exchange Listing Agreement and Section A10 of the New York Stock Exchange Company Manual, on the theory that the statute requires stock exchanges to adopt such rules.

2 15 U.S.C. § 77a *et seq.*

3 15 U.S.C. § 77aaa *et seq.*

4 This claim was heard pursuant to the pendent jurisdiction of the federal courts. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Cir. 1977) (*Van Gemert* II). Since $1,544,300 in principal amount of unregistered debentures had not been converted, it was a simple task to determine that the class members had suffered damages in the sum of $3,289,359.[5]

In the *Van Gemert* II appeal, the law firm of Kass, Goodkind, Wechsler and Gerstein, a member of the committee of attorneys for the plaintiffs,[6] urged for the first time that members of the class who filed proper proofs of claim should be permitted to receive, on a pro rata basis, the unclaimed portion of the total damage award. Boeing responded in opposition that these funds should be returned to it. Without reaching a conclusion as to the ultimate disposition of unclaimed damages, we rejected the firm's proposal. *Id.* at 815-16. Such a plan, we held, constituted a form of fluid class recovery, involving distribution of the unclaimed portion of the judgment to a "next-best" class in contravention of *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). We stated that the procedure suggested by the Kass firm would result in the expropriation of the claims of the silent class members and accordingly, create a windfall for those who filed claims. The panel also concluded that the proposal could not be justified on the ground that claiming class members would use a portion of the unclaimed funds to defray their legal expenses. This, it was decided, would require Boeing to pay indirectly for the legal expenses of successful litigants.

Upon a second remand to Judge Ryan for entry of judgment, he ordered that plaintiffs' attorneys be awarded

5 According to the report of the Special Master appointed by Judge Ryan, filed with this court as a brief *amicus curiae*, the judgment fund now exceeds $6,500,000, including prejudgment interest.

6 The other members of the committee were Nathan, Mannheimer, Asche, Winer & Friedman, and Irving Steinman.

their fees, expenses and disbursements from the total amount of the judgment. He concluded that it was equitable for all class members—claiming and nonclaiming alike—to bear a pro rata share of the costs of producing the judgment in their favor.[7] Boeing appealed this ruling as contrary to the mandate of *Van Gemert* II, contending that the attorneys should receive compensation only from the claimed portion of the judgment.

A panel of this court, in an opinion written by Judge Van Graafeiland, held that the claims of individual class members could not be treated collectively, as if they belonged to the class as a whole, and that because absent class members had not received the benefit of the attorneys' labors, no charge or assessment may be made against their undistributed shares. *Van Gemert* v. *Boeing Co.*, 573 F.2d 733, 736 (2d Cir. 1978) (*Van Gemert* III).[8]

Because of the significance of the issues in this case for the conduct of class action litigation, we decided to rehear the case *en banc*.[9] We now affirm the judgment of the district court.

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7 Under Judge Ryan's order, each class member's contribution to the total amount of attorneys' fees must bear the same ratio to all such fees as his own recovery bears to the total class recovery.

8 Judge Oakes dissented in part on the ground that the principles governing the award of attorneys' fees are inapplicable to costs and disbursements. *Van Gemert* III, 573 F.2d at 738.

9 Having briefed the issue at our request, Boeing presents the threshold argument that under the "law of the case doctrine," *Van Gemert* II precludes the recovery of costs and attorneys' fees from the unclaimed portion of the bondholders' judgment. We cannot accept this contention.

Van Gemert II held that class members who filed proofs of claim could not be awarded the unclaimed portion of the judgment on a pro rata basis, even if some of those funds were to be used to pay their lawyers. To allow the money judgment to be distributed in such a fashion would countenance "expropriation" of the shares of absentees, and would enable well-informed claimants to avoid paying any attorneys' fees at all. *Van Gemert* III raises the wholly different question whether the lawyers for the class may be awarded their fees and disbursements from the judgment considered as a common fund. The claiming class members will not receive a "windfall," for no payment of funds to a "next-best" class of persons is contemplated by Judge Ryan's order. Rather, the costs of the litigation will be borne by the entire fund, and each class member will be required to pay his proportionate share of attorneys' fees.

Even if *Van Gemert* II had reached the issue raised on this appeal, the law of the case doctrine would not dictate that we treat its ruling as dispositive. Boeing, citing *Bromley* v. *Crisp*, 561 F.2d 1351, 1363 (10th Cir. 1977) (*en banc*), *cert. denied*, 98 S. Ct. 1458 (1978), and *Lathan* v. *Brinegar*, 506 F.2d 677, 691 (9th Cir. 1974) (*en banc*), argues that it would be prudent for the court sitting *en banc* to consider itself bound by the law of the case established by a panel on an earlier appeal, when that ruling was not reviewed *en banc*.

We believe, however, that such a rule would be far too restrictive and that, sitting *en banc*, we may overrule any panel decision that a majority of the active judges believes was wrongly decided, unless a party would be seriously prejudiced as a result, *First National Bank of Hollywood* v. *American Foam Rubber Corp.*, 530 F.2d 450, 453 n.3 (2d Cir. 1976). The purpose of the "law of the case" doctrine is to prevent the continuous relitigation of issues decided by a panel at an earlier stage of a suit. The doctrine, which is in any event no more than an appeal to the "good sense" of the court, *see, e.g.*, *Zdanok* v. *Glidden Corp.*, 327 F.2d 944, 952-53 (2d Cir. 1964), is properly applied to the district court and to other panels of the Court of Appeals. It cannot immunize panel decisions from review by the court *en banc*. *Accord, In re Central R.R. Co.*, 485 F.2d 208, 210-11 (3d Cir. 1973) (*en banc*). And, given the rarity with which petitions for rehearing *en banc* are granted, the spectre conjured by Boeing of continual "second guessing" of panel decisions is insubstantial indeed.

II.

Any consideration of the propriety of awarding attorneys' fees in the federal courts must begin with *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). In that seminal case, the Supreme Court decided that, absent statutory authorization, the federal courts may not shift the costs of litigation from the winning to the losing party. The *Alyeska* Court noted, however, that there are two exceptions to this rule. First, there is inherent power in the courts to assess attorneys' fees for the "will-

ful disobedience of a court order," or when a party has acted in bad faith, *id.* at 258-59. Second, historically, the federal courts have exercised an equitable power to allow attorneys' fees and costs to be charged against a fund created, increased, or protected by successful[10] litigation. *Id.* at 257-58.

The application for the fees may be made by the plaintiffs themselves, *Trustees* v. *Greenough,* 105 U.S. 527 (1881), on the ground that they have performed a service benefiting others similarly situated. But a plaintiff's attorney may himself present a claim to compensation and reimbursement for expenses from the fund, on the theory that he has provided or preserved a benefit—the fund itself—and that the reasonable value of his services should be borne proportionately by all plaintiffs. *Central R.R. & Banking Co.* v. *Pettus,* 113 U.S. 116 (1885).

The paradigmatic common fund is an express trust, as in *Greenough.* Litigation can also "create" a fund, as when the assets of a debtor are brought within the reach of creditors, *Pettus, supra.* Nevertheless, the common fund doctrine has not been restricted to equitable actions in which the court exercised control over a "res". In *City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448, 454, 468-69 (2d Cir. 1974), we awarded attorneys' fees out of the settlement fund in a private antitrust class action suit. Similarly, since a money judgment is itself an identifiable asset on which the trial court may impose a charge, such judgments have also been accorded common fund treatment, *see, e.g.,*

10 The common fund doctrine may be invoked only by successful litigants, *see Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 275 (1975). It "would be a strange inversion if the [common fund] doctrine enabled losers in adversary contests to charge their counsel fees to winners." Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds,*" 87 Harv. L. Rev. 1597, 1626-27 (1974).

Union Cent. Life Ins. Co. v. *Hamilton Steel Prods., Inc.,* 493 F.2d 76 (7th Cir. 1974); *see generally,* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 Harv. L. Rev. 849, 920 (1975); Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv. L. Rev. 1597, 1620-24 (1974).

In *Alyeska Pipeline Service Co., supra,* 421 U.S. at 265 n.39, the Supreme Court established criteria for determining whether benefits derived from litigation could properly be treated as a common fund. The Court stated that the common fund rationale was ill-suited to public interest litigation involving nebulous benefits accruing to a vast class of people. Accordingly, a common benefit did not accrue from litigation over the environmental impact of the trans-Alaska pipeline. The Court declared:

> In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting. In this case, however, sophisticated economic analysis could be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs. *Id.*

We believe that the judgment against Boeing constitutes a common fund within the meaning of *Alyeska.*[11] The class

11 The common fund doctrine also presupposes that the court has "the authority to adjudicate the rights and duties" of those with an interest in the fund, Dawson, *supra,* note 10 at 1618. Although the beneficiaries need not sue as a class to meet this criterion, *United States* v. *ASCAP,* 466 F.2d 917, 919 (2d Cir. 1972), a class action presents the clearest case for the exercise of such judicial authority. The plaintiffs in the suit before us were certified as a 23 (b) (1) class

of debenture holders here is comparable in size to that of the creditors in *Pettus* and the bondholders in *Greenough*. Moreover, the *Van Gemert* class is smaller than the class of 85,000 union members in *Hall* v. *Cole*, 412 U.S. 1 (1973) and the 8,987 shareholders in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)—two cases cited with approval in *Alyeska*.[12] Nor is the class membership here difficult to identify for the purposes of tracing the benefits accurately. Unlike the sprawling throng of potential beneficiaries in *Alyeska*—all those who would derive benefits from a pristine Alaskan wilderness—the beneficiaries of this action form a well-defined class, limited to those who failed to convert unregistered bonds of a specific issue of Boeing debentures. The names of the individual bondholders are not, to be sure, always ascertainable. But since each unconverted debenture is readily identifiable—and in fact bears an explicit number—it is quite evident that the damages owed to each plaintiff can be traced to each debenture with perfect accuracy. Elementary arithmetic, not "sophisticated economic analysis", is all that is required to determine the distribution of benefits. To calculate the amount of the judgment, it was necessary only to subtract the redemption price of each debenture from the value of the two shares of common stock to which it could have been converted. And it is equally simple to prorate the

under the Federal Rules. No class member could have opted out of such a suit even if he had desired to do so; once the class was certified, no other forum could have adjudicated their rights with respect to the fund.

12 In *Brennan* v. *United Steelworkers of America*, 553 F.2d 586 (3d Cir. 1977), the court ruled that a common benefit could accrue to a class of 1,400,000 union members, noting that the plaintiff class need not be small in "absolute numbers." *Id.* at 606. *See also, Yablonski* v. *United Mine Workers of America*, 466 F.2d 424 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973) (class of 162,000 union members).

cost of the suit with complete exactitude so that each debenture holder's recovery is taxed with the cost of vindicating his interest.[13] Indeed, the "identification" and "tracing" criteria are met more completely in the case before us than in either *Hall* or *Mills*, neither of which involved tangible economic benefits at all.

III.

The panel in *Van Gemert* III held that the common fund doctrine requires that expenses be assessed only against those who have actually claimed the fruits of the litigation, because no one else has benefited from the suit. We believe this construction of the concept of a "benefit" is too narrow and is not supported by the common fund case law. In *Greenough*, the Court noted that not every bondholder had filed claims against the fund, but nevertheless charged the entire fund with costs and fees. 105 U.S. at 529, 531. In *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), the plaintiff sued individually to establish her right, as a beneficiary of a trust consisting of bonds held by a bank, to a lien on the proceeds from the sale of the bonds. In the process, she established the right of thirteen other beneficiaries to recover a share of the trust's assets. The Court, in an opinion by Justice Frankfurter, allowed the plaintiff to recover her attorney's fees out of those assets, although it was by no means clear that the other *cestuis que trust* would bring suit. If a plaintiff class-member is adjudicated to have an interest in a fund, he has benefited within the meaning of the common fund doctrine.[14]

13 *See* note 7 *supra*.

14 Citing the venerable Williston, our Brother Van Graafeiland maintains that the common fund doctrine is inapplicable unless the benefit conferred is knowingly accepted. Any requirement that the absentees

The rationale for such a rule is evident, as the case before us indicates. A portion of the judgment won by plaintiffs' attorneys—at least $213 for each unconverted debenture—is due every member of the class. Each plaintiff has a present vested interest in the class recovery, and his share of the judgment may be received on request. It cannot be urged convincingly, then, that the absent plaintiffs have not received a benefit from the litigation.

Our conclusion that the district court properly charged attorneys' fees against the shares of nonclaiming class members is far from heretical. At common law, an attorney's lien attached to a judgment obtained for his client, as security for his fees and expenditures. *See* Restatement (2d) Agency § 464(e). Under this doctrine, which is as

actually file claims, however, is foreclosed by *Sprague* and *Greenough*. Moreover, as *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345, 351 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967) noted, it is sufficient if the attorneys' services and the benefits accruing from it are "impliedly" accepted. Manifestly, plaintiffs in a 23(b)(3) class action, who have been provided with notice and an opportunity to opt out of the suit, must be said to have accepted the attorneys' services, and the benefits that may flow from them.

Of course, class actions certified under Rule 23(b)(2) or, as in this case, 23(b)(1), do not contain an opt-out privilege. This reflects the conclusion of those who drafted the Rules that individual choice should be subordinated to the interests of the class as a whole to avoid inconsistent judgments or prejudice to absent class members. Because class certification represents a judicial determination that the absentees are adequately represented, it would frustrate the Rule if we were to require an investigation into each plaintiff's willingness to accept the benefits of the litigation.

Our conclusion rests on firm foundations, for absentees are in no way harmed by our decision. It simply does not accord with fact to argue, as the minority seems to, that because a deduction from the shares of unnamed plaintiffs has been made for attorneys' fees, they are being held liable for *more* than they have gained. If, as we hold, they have benefited from the judgment, it is appropriate to charge them their *pro rata* share. And if, as the dissent contends, they have gained nothing by the victory against Boeing, then it is difficult to understand how a deduction from the spoils of that victory can be said to have injured them. The dissenters cannot have it both ways.

American as the "American Rule" against charging the losing party with the fees of his adversary, the attorney is *himself* entitled to have the judgment enforced and compensation paid, *id.* and comment n.; *Falcone* v. *Hall*, 235 F.2d 860 (D.C. Cir. 1956). Indeed, in *Pettus*, Justice Harlan noted that under state law the lien of plaintiffs' attorney could not be defeated by the successful purchase of the plaintiffs' claims. 113 U.S. at 127-28. Thus, since the attorney's right to his fee arose out of his creation of the judgment and not his client's receipt of the proceeds, our interpretation of the common fund doctrine is in harmony with time-honored principles of the common law.[15]

In contrast to the "expropriation" feared in *Van Gemert* II, deducting fees from each plaintiff's share in the judg-

15 The argument that there is no attorney-client relationship between the absentees and class counsel is not persuasive. A certification under Rule 23(c) makes the *class* the attorney's client for all practical purposes, *Developments in the Law: Class Actions*, 89 Harv. L. Rev. 1318, 1592-97 (1976). The judgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented. Without question, it is settled that the attorney is not free to advocate the interests of the named plaintiffs alone. *See Gonzales* v. *Cassidy*, 474 F.2d 67, 75-76 (5th Cir. 1973). And absentees do not cease to be clients simply because they fail to claim their portion of the class recovery.

It begs the question to argue that since absentees are not parties for all purposes, they cannot be parties when the objective is to award attorneys' fees. The absentees are certainly parties in the most fundamental sense, for, as we have already indicated, they are bound by the judgment. Whether a given procedural rule should be applied to those who are not named plaintiffs depends on the function of the rule. Absentees are not considered parties against whom counterclaims under Fed. R. Civ. P. 13 may be asserted, because "the right to counterclaim is readily subject to abuse as a tactical device to encourage plaintiffs to opt out." *See, e.g., Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973). There can be no comparable objection to treating unnamed plaintiffs as parties for the purpose of assessing attorneys' fees, for no affirmative burden is placed on them by our ruling today. Indeed, it is only when the case is resolved in their favor, because of their counsel's efforts, that fees are assessed.

ment will not benefit some plaintiffs at the expense of others.[16] Each plaintiff will receive only his pro rata share of the recovery, less attorneys' fees, independent of the size of the unclaimed portion of the fund.[17] This is not a "fluid recovery" case.

We believe, moreover, that a ruling for Boeing would be unfair to both the claiming plaintiffs and the class attorneys, and would deter lawyers from bringing meritorious lawsuits. In setting attorneys' fees in class action litigation, courts must multiply the number of hours spent on the litigation by an appropriate hourly rate, and then adjust the fee to take into account the difficulty of the case, the attorney's risk in undertaking it, and the quality of representation.[18]

If victorious attorneys were permitted to charge fees only against claiming class members, the standards evolved by the courts to ensure rationality and fairness in fee setting would go for nought, because the compensation the attor-

16 We therefore do not find apposite to our holding today the concern expressed in *Van Gemert* II that claimants may be encouraged to keep absent class members uninformed about the judgment in their favor. In any event, the district judge will invariably require that adequate notice of the judgment be provided. In the instant case, Judge Ryan appointed a special master for this purpose, who sent notices to each individual whose name could be ascertained, and to all brokerage firms, banks, and other financial institutions, with instructions to transmit the notice to interested clients. Notice was also published once a week for three consecutive weeks in the *Wall Street Journal* and the *New York Times*.

Any alleged conflict of interest between the attorneys and the unnamed plaintiffs is vitiated here, as in every class action, by judicial supervision of the fee award.

17 We intimate no view as to the appropriate ultimate disposition of the remainder of the fund.

18 *See, e.g., City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Lindy Brothers Builders, Inc.* v. *American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973).

ney received would be dependent on a purely fortuitous event. It would not suffice to adopt a rule that the attorney's fee should be set at a fixed sum, calculated by considering the factors described above, but chargeable only against the recovery of those who claimed their shares. In suits in which a relatively small number of claimants come forward, the attorney's fee would leave those claimants with no recovery at all—if, in fact, sufficient funds were claimed to pay the entire fee. In the instant case, each debenture holder had an economically significant interest in the litigation—and yet deducting attorneys' fees only from the claimed portion of the judgment may leave each plaintiff bereft of benefits.[19] Such a rule would indeed make this a "lawyer's lawsuit," *Van Gemert* III, *supra*, 573 F.2d at 735.

On the other hand, if we were to protect the plaintiffs by limiting the attorney to a fixed percentage of the judgment actually claimed, the resulting fee would be entirely dependent on the number of plaintiffs who came forward. Considerations of the difficulty of the case, the quality of representation, and the hours spent by the attorney, would not determine the ultimate size of the fee. Nor can the attorney always determine whether it would be worthwhile for him to undertake the risks of litigation, for the number of plaintiffs who will come forward after judgment is often unpredictable. Of course, the risk that only a fraction of plaintiffs will claim is greatest if the individual claims are small.[20] The percentage of class members who file claims,

19 Judge Ryan has not yet fixed the attorneys' fees in this case.

20 The drafters of Rule 23 (b) (3) contemplated that class actions would be utilized to enable those with individually non-viable claims to vindicate their interests. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I*,

however, is not a function solely of the value of each plaintiff's stake in the litigation. In this very case, although the judgment gives each class member the right to twice his original investment in damages, only 20% of the judgment has been claimed after months of diligent efforts to locate absentees. The Special Master appointed by Judge Ryan attributed the low response to "both the passage of 12 years and the fact that the debentures were unregistered." [21] If the number of claiming plaintiffs were to become the dominant—indeed determinative—factor in setting appropriate attorneys' fees, lawyers would be discouraged from bringing class suits, regardless the merits of the case.

Refusing to charge fees against the entire judgment fund would also put a high premium on settling cases. When a class action is settled, the attorney's fee conventionally comes "off the top". *See, e.g., Blank* v. *Talley Industries,* 390 F. Supp. 1, 3 (S.D.N.Y. 1975) (Weinfeld, J.). The attorney is assured of the full amount of the fee that the court has found to be reasonable, regardless of whether some of his clients have failed to claim.[22] To be sure, in determining fair compensation the judge may take into account the number of plaintiffs likely to claim, *id.,* but the claimed portion of the fund does not place a ceiling on the fee. *See, e.g., Voege* v. *Ackerman,* 70 F.R.D. 693 (S.D.N.Y. 1976) (Weinfeld, J.). If an attorney's fee in a class action that goes to final judgment were so restricted, lawyers would be tempted to consider settling their clients'

81 Harv. L. Rev. 356, 397-98 (1967). The rule propounded by the dissenters would have a devastating effect on (b) (3) class suits.

21 Report of the Special Master, *supra* note 5, at 4.

22 Interim fees are often awarded after a settlement has been approved but before the parties have arrived at a plan of distribution to sub-classes—and, of course, before individual claims have been filed. *See* 3 H. Newberg, *Class Actions* § 6975 at 1263-66 & n.10 (1977).

claims for less than adequate sums. Fee awards should not be so structured as to encourage such conduct.[23]

Finally, our holding is perfectly consistent with the "American rule". The rationale of that doctrine is that litigants should not be deterred from pursuing *bona fide* claims or defenses by fear that they will be burdened by the costs and attorneys' fees of their successful adversary. *See Fleischman Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 718 (1967). Under today's decision, however, the fees of the attorneys for the class will be deducted from the amount for which Boeing has *already* been held liable. There is no "surcharge" on the defeated litigant.

Affirmed.

VAN GRAAFEILAND, J., dissenting
(with whom Judges MULLIGAN and TIMBERS concur):

With all respect to our colleagues in the majority, we believe they have allowed their enthusiasm for class litigation to lead them into approving an award to attorneys that cannot be justified under either contract or quasi-contract principles of law. In our view, there is no attorney-client relationship between the named plaintiffs' attorneys and the non-claiming absentee debenture holders upon which to base a claim reading in contract. Nor have the non-claiming absentees been unjustly enriched, so as to give the lawyers a quasi-contractual right of recovery based on quantum meruit. In short, we see nothing in this case that justifies an award of substantial fees to lawyers for work purportedly performed on behalf of persons who are not their clients and who, themselves, have not received a single penny as a result of the lawyers' efforts.

23 *See generally* Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest,* 4 J. Legal Studies 47, 56-60 (1975).

Little purpose would be served by simply repeating in this dissent what has already been said in prior opinions and is now being rejected by this en banc court. However, some repetition of both the law and the facts is necessary as a framework for the discussion that follows.

When Boeing, on July 15, 1958, offered its shareholders the right to subscribe to its debentures, the subscription rights were evidenced by warrants issued in the shareholders' names. Each warrant was fully negotiable, however, and could be transferred by delivery in blank. The transferee was entitled to use the warrant for subscription without having a new warrant issued. Approximately 7,000,000 rights were issued; and, between July 15, 1958, and July 29, 1958, the date the subscription offer expired, approximately 1,700,000 of them were traded on the New York Stock Exchange. During this same period, subscriptions having a total value of $29,578,500 were received by Boeing's transfer agent.

Between August 4, 1958, when the debentures were admitted to trading on the New York Stock Exchange, and March 29, 1966, when trading terminated, over $69 million in debentures were traded. Because the debentures, like the warrants, were in bearer form and negotiable upon delivery, there was no way of knowing in 1966 how many of them were still held by the original subscribers. Semi-annual interest on the debentures was collected by detaching a coupon and forwarding it to the Chase Manhattan Bank, the indenture trustee. A vast majority of the interest coupons were tendered to Chase by collecting banks on behalf of unidentified debenture holders. In those instances where coupons were tendered directly by debenture holders, Chase made a list of the tenderers which it retained for approximately six months.

As of March 8, 1966, there were approximately 27,000 debentures outstanding in the aggregate principal amount of $21,514,900. As of March 29, 1966, conversion rights had not been exercised for debentures in the face amount of $1,544,300.

During the next several months, ten separate actions were commenced against Boeing on behalf of non-converting debenture holders. The Van Gemert action was commenced on June 23, 1966. On July 21, 1966, upon the application of Boeing's attorneys, the district judge signed an order directing all present and former holders of unconverted debentures to show cause before him on September 6, 1966, why an order should not be entered determining that the action be maintained as a class action on their behalf, why they should not be permitted to appear and intervene in the action and present claims, if any, and why they should not be included in the class and bound by the final judgment. The court directed that Boeing give notice to the present and former debenture holders by mailing a court-approved form to those "whose addresses may be known to the defendants" and by publishing the notice twice a week for two successive weeks in the national editions of the New York Times and the Wall Street Journal. Because there was no way Boeing could identify each holder of the bearer debentures as of March 29, 1966, it compiled a list of persons who it believed might at some time have had an interest in the unconverted debentures and addressed notices to all of them.

No one knows, of course, whether each putative class member received a copy of the notice. No one knows how many of them may have been dead or incompetent when the notice was sent. Indeed, to this date, no one can accurately identify all of the class members. Those persons who did receive notice found no reference therein to any

legal representation for the class. No attorneys except Boeing's were named or described. Nothing was said about attorneys' fees or disbursements. No mention was made of a "fund" from which the attorneys would be paid.

These absentee debenture holders did not become clients of the attorneys for the named plaintiffs, nor of those attorneys who were subsequently appointed by the district court to serve as the "representative committee" of plaintiffs' attorneys. 3 H. Newberg, *Class Actions* ¶ 6824C at 1147 (1977). Indeed, for most purposes, the absentees could not even be considered parties to the law suit. *See In re Four Seasons Securities Laws Litigation*, 525 F.2d 500, 504 (10th Cir. 1975); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 348-49 (E.D. Pa. 1976); *Lamb* v. *United Security Life Co.*, 59 F.R.D. 44, 48-49 (D.C. Iowa 1973); *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973); 2 H. Newberg, *Class Actions, supra*, § 2780 at 1249-50 Accordingly, we fail to see the significance of the majority's discussion of attorneys' liens, "clients" who have failed to claim, and "parties" who must bear their own attorneys' fees.

We do see significance, however, in the fact that attorneys who profess to be representing the interests of absentee class members have no hesitancy in leaving them without representation when the matter of attorneys' fees is at issue. *Cf. Cherner* v. *Transitron Electronic Corp.*, 221 F.Supp. 55, 61 (D. Mass. 1963). We believe that once an attorney undertakes to represent class interests, it makes no difference by whom he was retained; he owes to all class members a duty of equal and fair representation. *Berner* v. *Equitable Office Bldg. Corp.*, 175 F.2d 218, 220 (2d Cir. 1949). A conflict of interest that prevents full and fair representation not only violates Rule 23 but also raises a serious question of lack of due process. *See Carroll* v. *American Federation of Musicians*, 372 F.2d 155,

162 (2d Cir. 1967), *vacated and remanded on other grounds*, 391 U.S. 99 (1968); *Phillips* v. *Klassen*, 502 F.2d 362, 366 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). If the absentee class members who have received nothing from the escrow fund were to discover that a group of unknown lawyers had received substantial awards from the absentees' undistributed shares, it is hard to believe that the absentees would not strenuously object to what must appear to them to be a lawyer's windfall. This is a viewpoint that should be expounded by the lawyers who claim to be the absentees' representatives. Instead, the lawyers advocate only their own cause and, as an incident thereto, the cause of their clients. This is a strange position indeed for lawyers who are seeking equitable relief from the courts. *Cf. National Association of Regional Medical Programs, Inc.* v. *Matthews*, 551 F.2d 340, 344-46 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

In *Van Gemert III*, 573 F.2d 733, we held that an award of fees under the equitable fund doctrine must be based on a theory of quantum meruit and that class attorneys should not be compensated for potential benefits not accepted by absent members of the class. Although we had no way of knowing at that time how much of the escrow fund would remain unclaimed, we stated that "the history of class litigation to date has demonstrated a surprisingly small response by absent members notified of their right to make claims." *Id.* at 736 n.4. This is one of the few statements in the opinion that has withstood the careful scrutiny of our learned colleagues. As Chief Judge Kaufman points out, claims representing only twenty percent of the escrow account have been filed, and the filing deadline was September 1, 1978.[1] Taking into account that the named plaintiffs

1 The notice of availability of proofs of claim stated that any debenture holder who did not file by the deadline date would be precluded from participating in the award of damages.

in the ten original lawsuits owned over ten percent of the unconverted debentures for which damages are being sought, the response by absentee holders is indeed small. At the present juncture, it appears that eighty percent of the fees and disbursements of the lawyers for the named plaintiffs will be paid from funds earmarked for absent class members who will not receive a penny.[2] We in the dissent do not believe that such a bizarre state of affairs can be justified simply by pointing to a "common fund" as the source of the lawyers' fees.

The "equitable" or "common" fund doctrine was created for the purpose of preventing unjust enrichment. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970); *Fleischman Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 719 (1967); *Grace* v. *Ludwig*, 484 F.2d 1262, 1269 (2d Cir. 1973), *cert. denied*, 416 U.S. 905. There can be no unjust enrichment unless a benefit has been conferred and knowingly accepted. *Woodruff* v. *New State Ice Co.*, 197 F.2d 36, 38 (10th Cir. 1952); *In re Irving-Austin Bldg. Corp.*, 100 F.2d 574, 578 (7th Cir. 1938). *Williston on Contracts* puts it this way:

> Three elements must be established in order that a plaintiff may establish a claim based on unjust enrichment. These elements are:
>
> 1. A benefit conferred upon the defendant by the plaintiff;
>
> 2. An appreciation or knowledge by the defendant of the benefit; and

---

2 It is possible that the September 1st deadline may be extended by the district court and that additional filings may reduce somewhat the eighty percent figure. However, the principle that one should not be required to pay for something he has neither requested nor received remains the same, whether the figure is eighty percent or one percent.

> 3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

12 *Williston on Contracts* § 1479 at 276 (3d ed. 1970).

This rule requiring a knowing acceptance of benefits applies to a fund created through the efforts of an attorney. *See Haynes* v. *Rederi A/S Aladdin*, 361 F.2d 345, 351 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967); *Lea* v. *Paterson Sav. Inst.*, 142 F.2d 932, 934 (5th Cir. 1944). Newberg describes its application to class recovery funds as follows:

> Absent class members have no obligation to pay attorneys' fees and litigation costs, except when they elect to accept the benefit of the litigation. Absent class members who accept any part of any recovery fund are liable for their proportional share of fees and costs. The attorney who creates a fund is entitled to a fee from each class member who accepts the benefits of the fund.

2 H. Newberg, *Class Actions, supra*, § 2780 at 1249.

Another established rule of quasi-contract law is that an innocent recipient of benefits cannot be held liable to any greater extent than the amount by which he has been enriched. *Hill* v. *Waxberg*, 237 F.2d 936, 939 (9th Cir. 1956); *In re Irving-Austin Bldg. Corp., supra*, 100 F.2d at 578; *Dunn* v. *Phoenix Village, Inc.*, 213 F. Supp. 936, 952-53 (W.D. Ark. 1963); *Restatement of Restitution* § 1 comment e, § 155; Beale, *The Measure of Recovery Upon Implied and Quasi Contracts*, 19 Yale L.J. 609, 620-21 (1910).

No matter which of the foregoing rules is applied to the facts of this case, the order appealed from is wrong.

The Special Master's notice to debenture holders made it clear that receipt of the notice did not mean that the recipient would ultimately be found entitled to participate in the award of damages. The burden was placed upon the recipient to establish his right of recovery and to submit executed proofs of claim and supporting documents by September 1, 1978. If the non-claiming absentees were not precluded after September 1, 1978, from participating in the fund, the day will surely come when they will be. We are convinced that these individuals, thus precluded from sharing in the "common fund", cannot be said to have accepted the benefits of the lawyers' efforts. Any charge levied against them for attorneys' fees is clearly in excess of benefits received.

When the panel in *Van Gemert I*, 520 F.2d 1373, found Boeing's notice of redemption to be inadequate, it directed that damages be awarded to the seven percent of debenture holders who did not convert, without considering whether their failure to convert might have resulted from some cause other than lack of notice. All the non-converters had to do in order to collect was to file a claim. The Court now holds that, insofar as the attorneys' right of recovery is concerned, it isn't even necessary that a claim be filed by the debenture holders. Our brothers will not allow the absentees' failure to file, whether caused by death, incompetency, incapacity, lack of knowledge, or unwillingness, to prevent the lawyers from taking their cut of the unclaimed moneys.[3]

3 Perhaps, as the majority opinion intimates, we in the dissent are too much influenced by "venerable" works such as Williston on Contracts. Whatever the reason, we are unable to visualize a situation in which a non-converting debenture holder who died before the action was commenced can become a client of the "class" attorneys or can "impliedly" accept the benefits of the attorneys' efforts.

(footnote continued on next page)

This means that attorneys may sue on behalf of unknown and unnamed individuals, secure a money judgment, ostensibly on their behalf, and pocket a substantial part of the judgment funds earmarked for non-claiming absentees, without these absentees even knowing what has happened. Apparently, our colleagues in the majority either believe this is not occurring in the instant case or else deem its occurrence to be of no consequence.[4] We disagree on both counts. If lawyers must receive this sort of favored treatment to encourage the bringing of class actions, perhaps the game is not worth the candle; the public is giving up more than it is receiving in return.

We continue to believe that *Van Gemert III* was rightly decided, and we adhere to the views expressed therein.

We likewise cannot comprehend how the holder of a $100 debenture, who for any of a number of reasons does not collect, can be said to benefit to the same extent as the holder of a $100 debenture who does collect so that their "pro-rata" shares of attorneys' fees are the same.

4 The majority's attitude appears to be summed up in footnote 14 of the majority opinion where they say that deducting attorneys' fees from the "spoils" of the litigation cannot injure absentee class members who are not going to collect anyway.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 551—September Term, 1977.

(Argued December 12, 1977 Decided March 27, 1978.)

Docket No. 77-7547

WILLIAM R. VAN GEMERT, et al.,

Plaintiffs-Appellees,

v.

THE BOEING COMPANY
(Formerly the Boeing Airplane Company) et al.,

Defendants-Appellants.

Before:

MULLIGAN, OAKES and VAN GRAAFEILAND,
Circuit Judges.

Appeal from a final order of Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York which directed that plaintiffs' attorneys' fees be paid from the entire class fund rather than from that portion which is claimed by class members.

Reversed and remanded with instructions.

S. HAZARD GILLESPIE, New York, N.Y. (Davis Polk & Wardwell of counsel), *for Appellants, The Boeing Company (Formerly The Boeing Airplane Company), et al.*

STUART D. WECHSLER, New York, N.Y. (Kass, Goodkind, Wechsler & Gerstein of counsel), *for Appellees, William R. Van Gemert, et al.*

IRVING STEINMAN, New York, N.Y. (Samuel Weinstein of counsel), *for Appellees, William R. Van Gemert, et al.*

NORMAN WINER, New York, N.Y. (Nathan, Mannheimer, Asche, Winer & Friedman, of counsel), *for Appellees, William R. Van Gemert, et al.*

VAN GRAAFEILAND, *Circuit Judge:*

In 1975, this Court ruled that appellant Boeing did not give adequate notice of its intention to call certain convertible debentures and held it liable in this class action brought on behalf of debenture holders who failed to convert. *Van Gemert* v. *Boeing Company,* 520 F.2d 1373 (2d Cir.), *cert, denied,* 423 U.S. 947 (1975). Subsequent proceedings in district court resulted in an order directing the deposit of the amount of the judgment award, approximately six million dollars, in an escrow account in a New York City bank. A Special Master was appointed, with authority to receive and pass upon proofs of claim and to supervise the administration of the judgment.

The order provided further that the members of plaintiffs' committee of attorneys be awarded their fees, expenses and disbursements, as fixed by the court, payment thereof to be made from the total amount of the judgment.[1] The sole issue on this appeal is whether that portion of the escrow fund which is not claimed hereafter by class members can be charged with a pro rata share of the attorneys'

1 The district court ordered that affidavits in support of counsels' application for fees be submitted within twenty days of the entry of judgment.

fees and expenses. We hold that until absent class members receive the benefit of the attorneys' labors by claiming their portions of the award, no such charge or assessment may be paid from their undistributed shares.

The question of unclaimed funds has been before this Court on a prior appeal which followed our original decision on liability. *Van Gemert* v. *Boeing Co.,* 553 F.2d 812 (2d Cir. 1977). On that appeal, we rejected a request that the shares of non-claiming class members be distributed pro rata among claiming members in order to assist them in paying their legal fees and disbursements. Citing *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974), we held that the "extraordinary remedy" of fluid class recovery was not justified under the circumstances of this case.[2] *Van Gemert,* 553 F.2d at 815-16. Appellees now seek to avoid the effect of our prior holding by requesting only a portion of the unclaimed funds, with payment thereof to be made directly to their attorneys.

In so doing, they rely upon the equitable or common fund doctrine fathered by the leading cases of *Trustees* v. *Greenough,* 105 U.S. 527 (1881), and *Central Railroad & Banking Co.* v. *Pettus,* 113 U.S. 116 (1885). Under this doctrine, an attorney who creates or preserves a fund for the benefit of others in addition to his client may be awarded compensation from those who accept the fruits of his labors. *Pettus,* 113 U.S. at 125, 127. This award is not based upon the existence of an attorney's lien against the fund, but rather upon the equitable principle that those who benefit from the attorney's services should pay for them.

2 Because the Supreme Court vacated and remanded *Eisen* on other grounds, it did not pass upon the issue of fluid class recovery. However, the Ninth Circuit appears to share this Circuit's unwillingness to treat the class as a whole as a judicial entity for purposes of suit. *See In re Hotel Telephone Charges,* 500 F.2d 86, 89-90 (9th Cir. 1974).

General Finance Corp. v. *New York State Rys.*, 3 F. Supp. 975, 976 (W.D.N.Y. 1933) (quoting *In re Gillaspie*, 190 F. 88, 91 (N.D. W. Va. 1911)). More recent decisions, expanding on the concept of unjust enrichment, have held that under appropriate circumstances an attorney may have a right to compensation from the beneficiaries of his labors even though his efforts have not been directed toward the creation or preservation of a fund. *See, e.g., Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-97 (1970); *Sprague* v. *Ticonic Bank*, 307 U.S. 161 (1939); *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005, 1008 (2d Cir. 1975).

Appellees contend that the foregoing line of authorities justifies an award for attorneys' fees from the six-million dollar class award regardless of whether the entire award is distributed to class members. This argument has a surface appeal because it suggests a procedure that not only appears to be reasonable, but also is simple to apply. There are, however, other factors which must be considered in weighing the merits of appellees' proposal.

Class actions, termed by some as "lawyer's lawsuits", *see Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1605 (1976), have received a good deal of criticism; and much of this has been directed at the substantial fees awarded to class attorneys. *See, e.g., Alpine Pharmacy, Inc.* v. *Chas. Pfizer & Co.*, 481 F.2d 1045, 1049-50 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973). Terms such as "golden harvest of fees", *Free World Foreign Cars, Inc.* v. *Alfa Romeo, S.p.A.*, 55 F.R.D. 26, 30 (S.D.N.Y. 1972), "astronomical fees", M. Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365, 366 (1972), and "enormous fees", Comment, 54 U. Det. J. Urb. L. 598, 611 (1977), are used to describe the allowances, which often run into the million of dollars.[3] Critics point

3 Counsel in this case are requesting fees of approximately two million dollars.

particularly to over-generous applications of the equitable fund doctrine, by means of which massive fees are awarded attorneys with too little regard for the interests of the class members. *See City of Detroit* v. *Grinnell Corp.*, 560 F.2d 1093, 1098 (2d Cir. 1977). This criticism, much of which is justified, prompts careful inquiry into whether it would be a misapplication of the equitable fund doctrine to permit counsel herein to collect part of their fees and expenses from the allocable shares of class members who claim none of the proceeds of the recovery.

Although the amendments to Rule 23 have been in effect since 1966, only a few class actions for damages have gone through a trial on the merits to judgment. *Eisen*, 479 F.2d at 1018-19; C. Wolfram, *The Antibiotics Class Actions*, 1976 Am. B. Foundation Research J., 251, 357; W. Simon, *Class Actions—Useful Tool or Engine of Destruction?*, 55 F.R.D. 375, 378 (1972); Note, *The Cy Pres Solution to the Damage Distribution Problems of Mass Class Actions*, 9 Ga. L. Rev. 893, 900 (1975). As a result, there has been little need to resolve the "troublesome question" of what to do with the unclaimed portion of a judgment for damages in favor of a class. *See Eisen*, 479 F.2d at 1012.[4] Fluid class recovery concepts have been adopted by a number of courts in actions which have terminated in settlement. *See, e.g., State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).[5] However,

4 Although we do not know that there will be any unclaimed funds, the history of class litigation to date has demonstrated a surprisingly small response by absent members notified of their right to make claims. *See* F. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 206 (1976); W. Simon, *Class Actions—Useful Tool or Engine of Destruction?*, 55 F.R.D. 375, 377-78 (1972).

5 *But see B & B Investment Club* v. *Kleinert's Inc.*, 62 F.R.D. 140, 150 (E.D. Pa. 1974) where the Court said: "We do not perceive any reason

precedents involving settlements are of little help when a case has been litigated through trial to judgment. *Eisen,* 479 F.2d at 1012; *City of Philadelphia* v. *American Oil Co.,* 53 F.R.D. 45, 71 (D.N.J. 1971).

This Court expressed in *Eisen, supra,* its unwillingness to adopt the concept of fluid class recovery, and, on a prior appeal, we refused to apply it in this litigation, which is fundamentally a private dispute arising out of the debenture contract. *Van Gemert,* 553 F.2d at 815, 816. In *Eisen* we said that "the claims of many may not be treated collectively or as 'the class as a whole' . . . ." 479 F.2d at 1014. The compensation of appellees' attorneys must come therefore from the individual class members, not from the "class as a whole."

Although the holdings which follow *Greenough* and *Pettus* speak broadly of recovering attorneys' fees from funds, intrinsic in every case is the requirement that benefits must accrue to those against whom expenses are assessed. *See Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, n.39 (1975). "The award of fees under the equitable fund doctrine is analogous to an action in quantum meruit: the individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the service performed." *Lindy Bros. Builders* v. *American Radiator & Standard Sanitary Corp.,* 487 F.2d 161, 165 (3d Cir. 1973).[6] Those who receive no benefit from the lawyer's work should not be required to pay for it. *Schechtman* v. *Wolfson,* 244 F.2d 537, 540 (2d

why maximum exposure could not be provided for with provisions made, depending upon the claims presented, for a return of any excess to the defendants."

6 In *City of Detroit* v. *Grinnell Corporation,* 495 F.2d 448, 470 (2d 1974), this Court, quoting *Lindy,* said: "In its simplest terms, the purpose of the fee award is to 'compensate the attorney for the reasonable value of services benefiting the . . . claimant.'"

Cir. 1957); *Nolte* v. *Hudson Nav. Co.,* 47 F.2d 166, 168 (2d Cir. 1931); *Simmons* v. *Friday,* 190 F.2d 849, 852 (8th Cir. 1951); *In re Irving-Austin Bldg. Corp.,* 100 F.2d 574, 578 (7th Cir. 1938); *Baltic Independent School District* v. *South Dakota High School Activities Association,* 362 F. Supp. 780, 786 (D. S. Dak. 1973); *cf. City of Miami Beach* v. *Jacobs,* 341 So. 2d 236 (Fla. Dist. Ct. App. 1976), *cert. denied,* 348 So. 2d 945 (Fla.), *cert. denied,* 98 S.Ct. 430 (1977). In a private action for damages such as this, "[t]here is no reason why the attorneys should be compensated for potential benefits not accepted by members of the class." *Blank* v. *Talley Industries, Inc.,* 390 F. Supp. 1, 6 (S.D.N.Y. 1975); *see also* 2 H. Newburg, *Class Actions,* ¶2780 at 1249 (1977); E. Labowitz, *Class Actions in the Federal System and in California: Shattering the Impossible Dream,* 23 Buf. L. Rev. 601, 647 (1974); *cf. Miller* v. *Union Barge Line Corporation,* 299 F. Supp. 718, 721 (W.D. Pa. 1969).

The application of this rule should cause no administrative difficulties on remand. Having directed the creation of an escrow account for the total amount of the possible recovery, the district court must now set a reasonable period of time for the proof of claims by class members. Because both administrative expenses and attorneys' fees and disbursements are to be charged pro rata against the awards to class members, payment of the awards must be deferred until the Special Master has completed processing the claims and his fees and expenses can be determined. At that point, the benefits accruing to class members can be "traced with some accuracy", and the costs can be "shifted with some exactitude to those benefiting." *Alyeska,* 421 U.S. at 265 n.39. The district court may then make an appropriate award for attorneys' fees and expenses.

If any funds remain unclaimed, the Court must make appropriate disposition of them. Because it is conjectural

as to whether there will be any unclaimed funds and because we have not been asked to consider the question of their disposition on this appeal, we express no present view on this matter. Recognizing, however, the possibility that unclaimed funds will be returned to the defendant,[7] we point to the Supreme Court holding in *Alyeska* as an additional reason why attorneys' fees should not now be charged against the entire escrow fund.

Reversed and remanded for further proceedings in accordance with this opinion.

OAKES, *Circuit Judge* (dissenting in part):

I first disavow the rhetoric of the majority directed at class actions and "class action lawyers." Class actions often are valuable tools for the individual plaintiff seeking justice against a defendant whose resources enable it to obtain the highest-paid lawyers to engage in such extensive discovery and other litigation techniques that one, two or three plaintiffs otherwise could never afford to conduct the lawsuit. This very case exemplifies the usefulness of class actions. Holders of $1.5 million of debentures that were worth $4 million only if converted by a given deadline were given inadequate and unreasonable notice of Boeing's intention to redeem the debentures and of the conversion

7 Those advocates of fluid class recovery who view class actions primarily as deterrents against wrongful conduct urge that unclaimed funds be disposed of in a manner similar to the cy pres doctrine of the law of trusts, or that they escheat to the state. 7A Wright & Miller, *Federal Practice and Procedure* § 1784 at 64 (Supp. 1976); S. Gordon, *Manageability Under the Proposed Uniform Class Actions Act*, 31 Sw. L.J. 715, 725 (1977); *Uniform Class Actions*, 63 A.B.A.J. 837, 842 (1977). However, even some proponents of fluid class recovery concede that under some circumstances it may be appropriate to return unclaimed funds to the defendant. *See, e.g.*, Uniform Class Actions Act (U.L.A.) § 15(b).

deadline. The class members therefore failed to exercise their conversion rights by the deadline. *Van Gemert* v. *Boeing Co.*, 520 F.2d 1373, 1378, 1383 (2d Cir.) (*Van Gemert I*), *cert. denied*, 423 U.S. 947 (1975). A decade of hard-fought difficult litigation has at last resulted in an award to the debenture holders which, had the original notice been sufficient, would have rightfully been theirs for the asking. In the process, against uphill odds, the lawyers for the now successful plaintiffs did an extraordinarily capable job, having even "made new law" on a complicated set of facts. Thus, criticism against class actions generally or plaintiffs' attorneys' fees in particular[1] falls flat when focused on the case at bar.

I am required to agree, however, with the basic theory of the majority opinion—that attorneys' *fees* are recoverable solely from the class members who file proper proofs of claim, rather than from the entire class fund—because so-called fluid class recovery was rejected in *Van Gemert* v. *Boeing Co.*, 553 F.2d 812, 815-16 (2d Cir. 1977) (*Van Gemert II*),[2] relying on *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). *Van Gemert II* is the "law of the circuit"; absent en banc treatment of the issue I am bound to follow it, therefore, whether or not I agree.

But this court's rejection of fluid class recoveries does not end the inquiry here. It seems to me that there is a

1 Those who criticize the fees of class action plaintiffs' lawyers seem to overlook the fees charged by class action defendants' lawyers. Could it be that a double standard is being applied?

2 *Van Gemert II* rejected the proposition that class members who file proper proofs of claim should be entitled to pro rata distribution of the unclaimed portion of the damage award. In doing so, it found unconvincing the argument that the unclaimed funds should be awarded to the claiming members of the class to defray their legal expenses. I agree with the majority to the extent that this holding precludes use of the unclaimed funds to pay the legal fees of class action attorneys.

sharp distinction between attorneys' fees and attorneys' disbursements. Plaintiffs' attorneys' fees in class actions generally being contingent, as they are here, are earned only if there is recovery. And *Van Gemert II's* implicit holding, *see* note 2 *supra,* that attorneys' fees may not be imposed on unclaimed funds, must be based on a similar theory—when there are no claimants, there is no "recovery"; thus this portion of the fund has not been "earned." Reimbursement of disbursements, by contrast, is not dependent on success. In fact, attorneys are precluded from expending funds on behalf of their clients unless the client remains ultimately liable for the expenses. *See* ABA Code of Professional Responsibility, Canon 5, Ethical Consideration 5-8, Disciplinary Rule 5-103(B). Accordingly, the number of ultimate claimants should not affect an attorney's right—perhaps his duty—to recover all disbursements from the entire fund. Additionally, fundamental principles of fairness underlying established law relating to recovery of expenses from a common fund,[3] *see Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 389-97 (1970), militate in favor of permitting repayment of attorneys' disbursements out of the fund as soon as it is established. These expenses, incurred for the benefit of all, are necessary if there is to be recovery by anyone. Attorneys who advance such sums do so expecting, as they must, reimbursement. Furthermore, if they are only repaid per claimant—that is, by computing the amount that each class member would have to contribute if the whole award were claimed, and then charging the claiming class members for disbursements as if all potential claimants had filed—the attorneys would have to bear the loss for the portion of out-of-pocket costs attributable to entitled class members

3 *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 257, 264-65 n.39 (1975), expressly preserved the common fund doctrine.

who failed to file their claims.[4] This result simply does not make common sense. I therefore dissent in part.

4 Of course, if the filing claimants were required to absorb the total disbursements out of their pro rata share of the recovery, the attorneys would obtain complete reimbursement. But this would reduce the filing claimants' compensation and, in turn, be unfair to them.

The result of the majority decision, *ante* at 2099-2100, is either that the attorneys absorb the disbursements attributable to unfiled claims or that the claiming members of the class end by being responsible for paying all attorneys' disbursements—perhaps even fees—from their shares of the award. With either result I disagree.

APPENDIX C

Judgment and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 1820 (SJR)

WILLIAM R. VAN GEMERT, *et al.*,

Plaintiffs,

—against—

THE BOEING COMPANY (formerly BOEING AIRPLANE COMPANY) and THOMAS R. WILCOX,

Defendants.

A judgment having been duly entered in the above action on December 30, 1976 pursuant to an order of this Court dated December 27, 1976 adjudging and decreeing that plaintiffs, in behalf of all members of the plaintiff class, shall recover as their damages herein the principal sum of $3,289,359 and that all members of the plaintiff class shall be entitled to receive interest at the rate allowed in this District from the date of said judgment to the date of payment, and containing other provisions as therein more fully set forth, and an appeal having been taken by plaintiffs individually and on behalf of the members of the class to the United States Court of Appeals for the Second Circuit from so much of the judgment and order which denied prejudgment interest on said sum of $3,289,359 from March 29, 1966 and denied plaintiffs appellants' claim that said damage sum awarded should be increased to $4,026,762, and the Court of Appeals having rendered its decision on April 18, 1977 affirming in part and reversing in part the judgment and order appealed from and remanding the case to

the District Court, Southern District of New York, affirming the damages awarded to plaintiffs and the class and reversing that portion of the judgment which directed that no pre-judgment interest be awarded, holding that under N.Y.C.P.L.R. § 5001(a) an award of interest at the legal rates from the date of the breach, March 29, 1966, was mandatory.

Now upon the said opinion and mandate of the United States Court of Appeals for the Second Circuit in the above entitled action decided April 18, 1977, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiffs in behalf of all members of the plaintiff class, which consists of all holders on March 29, 1966 of 4½% Convertible Subordinated Debentures of the Boeing Company who failed to exercise their conversion right before it terminated on March 29, 1966, shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest thereon at the legal rates fixed by the State of New York, N.Y.C.P.L.R. § 5001(a) from March 9, 1966 to the date of this judgment, with costs to be taxed; and it is further

ORDERED that the members of the Plaintiffs Committee of Attorneys be awarded their fees, expenses and disbursements as fixed by the Court to be paid out of said total amount of this judgment; and it is further

ORDERED that each member of the plaintiff class who has not heretofore redeemed his debenture shall be entitled to receive the sum of $316.25 for each $100 face amount of debenture together with interest as set forth above, plus interest upon the redemption value of $103.25 from March 29, 1966 to the date of payment to the debenture-holders, after deducting such class member's proportionate share of the total amount allowed for attorneys' fees, expenses and disbursements; each class member's proportionate

share shall bear the same ratio to all such fees, expenses and disbursements as such class member's recovery shall bear to the total recovery provided for herein; and it is further

ORDERED that each member of plaintiff class who has heretofore redeemed his debenture shall be entitled to receive the sum of $213 for each $100 face amount of debentures together with interest as set forth above, plus interest upon the redemption value of $103.25 from March 29, 1966 to the date of redemption, after deducting such class member's proportionate share of the total amount allowed for attorneys' fees, expenses and disbursements; each class member's proportionate share shall bear the same ratio to all such fees, expenses and disbursements as such class member's recovery shall bear to the total recovery provided for herein; and it is further

ORDERED that within 15 days after the entry of this judgment the defendants shall deposit the amount of this judgment plus interest at the rate of 6% per annum to the date of such deposit, in a commercial bank, a savings institution or other depository in the Borough of Manhattan, City of New York, upon which interest shall accumulate until disbursed, and that such monies shall be so held in escrow pending the further order of this Court; and it is further

ORDERED that affidavits in support of the fees to be awarded to the attorneys for the class shall be submitted to this Court within twenty days after the entry of this judgment; and it is further

ORDERED that George J. Solleder Jr., Esq., of 19 Rector Street, New York, New York, Telephone Number BO 9-2222, is hereby appointed Special Master with all the powers enumerated in Rule 53 of the Federal Rules of Civil Pro-

cedure to direct the parties in the necessary ministerial steps to effectuate the Judgment, receive all proofs of claim to participate in the Fund established by the Judgment, pass on the validity of same, direct the giving of notices to interested persons of hearings on disputed claims, conduct the necessary hearings, submit reports thereon and in general supervise the administration of the Judgment and decide all disputed questions of law and fact connected therewith subject to confirmation by the Court; all expenses incurred by the Special Master, including his fee, shall be paid out of the Fund; and it is further

ORDERED that this Court shall reserve and retain jurisdiction of this action pending the implementation of this order and judgment, for the making of such further orders or any other acts as may be necessary to carry out the purpose of this order and judgment.

Dated: New York, New York
June 30, 1977

/s/ SYLVESTER J. RYAN
U.S.D.J.

WILLIAM R. VAN GEMERT, *et al.* v. THE BOEING COMPANY and THOMAS R. WILCOX

ENDORSEMENT

---

66 Civ. 1820

Defendants' motion for an Order amending a portion of the Judgment and Order of this Court dated June 30, 1977 is denied.

The following parts of the Judgment and Order are claimed by the movants to be contradictory and violative of the Court of Appeals decision in this case (553 F.2d 812) and the holdings in other cases cited in the supporting memorandum.

> "ORDERED that the members of the Plaintiffs Committee of Attorneys be awarded their fees, expenses and disbursements as fixed by the Court to be paid out of said total amount of this judgment; . . .".
>
> • • •
>
> "after deducting such class member's proportionate share of the total amount allowed for attorneys' fees, expenses and disbursements; each class member's proportionate share shall bear the same ratio to all such fees, expenses and disbursements as such class member's recovery shall bear to the total recovery provided for herein; . . .",

These provisions do not depart from the Court of Appeals decision. The Court of Appeals ruled that those class members who file proofs of claim are not entitled to either a pro rata portion of the damage award which remains unclaimed nor to the unclaimed funds in order to defray the legal expenses of the claiming members.

Under the circumstances of this protracted suit, it is equitable that all class members both claiming and non-claiming, if any, bear a pro rata portion of the fees, expenses, disbursements and administration costs and the Judgment and Order so provides.

So ordered.

Dated: New York, New York
September 22, 1977

/s/ SYLVESTER J. RYAN
Senior U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Nos. 879, 880, Dockets 77-7009, 77-7031

Argued Feb. 25, 1977

Decided April 18, 1977

WILLIAM R. VAN GEMERT et al.,

Plaintiffs-Appellants,

v.

THE BOEING COMPANY AND THOMAS R. WILCOX,

Defendants-Appellees.

Before MANSFIELD and VAN GRAAFEILAND, Circuit Judges, and MISHLER, District Judge.*

VAN GRAAFEILAND, Circuit Judge:

This appeal arises from a consolidated class action brought by non-converting holders of the Boeing Company's 4½% convertible subordinated debentures due July 1, 1980. The amended complaint alleges that appellants had received inadequate notice of Boeing's intention to call the convertible debentures in question and were therefore unable to exercise their conversion rights prior to the deadline for the call which was midnight, March 29, 1966. The redemption price for each $100 of principal amount of debentures was $103.25. However, if appellants had been able to meet the call deadline, they could have converted each $100 of principal amount of debentures into at least

* Chief Judge, Eastern District of New York, sitting by designation.

two shares of common stock. On March 29, 1966 the common stock obtainable for each $100 of debentures was worth $316.25. Within thirty days thereafter the stock was worth $364. Damages demanded by appellants are based on the difference between the redemption price and the value of the common stock.

Originally, the District Court dismissed the complaint. On appeal, this Court reversed that judgment and remanded to the District Court for a determination of damages. *Van Gemert* v. *Boeing Co.*, 520 F.2d 1377 (2d Cir.), *cert. denied*, 423 U.S. 947, 96 S.Ct. 364, 46 L.Ed.2d 282 (1975). District Judge Ryan has now made that determination, and the case is once again before this Court.

Judge Ryan awarded damages based on the value of Boeing's common stock on March 29, 1966, which, as noted previously, was the cut-off date for the exercise of conversion privileges. He awarded no prejudgment interest. Appellants take exception to both of these rulings. They contend that, under New York's "fluctuating value" test, Judge Ryan should have valued the Boeing common stock as of April 14, 1966, when two shares of that stock were worth $364. Additionally, appellants assert that the District Court should have awarded prejudgment interest. We believe that Judge Ryan properly valued the stock as of March 29, 1966. However, we agree with appellants that they are entitled to pre-judgment interest.

[1] We are satisfied that *New York law controls* both of these questions. In our prior opinion, we found that appellants' federal claims were sufficient to provide the District Court with jurisdiction over the case. *Id.* at 1382. However, the relief granted appellants was founded on State law. In finding that Boeing had failed to provide the debenture holders with reasonably adequate notice of the redemption, we held that:

> The duty of reasonable notice arises out of the contract between Boeing and the debenture holders, pursuant to which Boeing was exercising its right to redeem the debentures.

Id. at 1383. It is the source of the right, not the basis of federal jurisdiction, which determines the controlling law. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F.2d 538, 540 n.1 (2d Cir. 1956); *see* 13 C. Wright, A Miller & E. Cooper, Federal Practice and Procedure § 3567, at 462 (1975). Consequently, in determining the proper measure of damages, New York State law is controlling.

Appellants urge us to apply the "fluctuating value" rule formulated by the New York courts for situations where there has been a conversion of stock. Succinctly stated, this rule provides that:

> The measure of damages for conversion of stock certificates is the cost of replacement within a reasonable period after the discovery of the conversion, regardless of when the conversion may have occurred .... (Citations omitted).

Hartford Accident & Indemnity Co. v. *Walston & Co.*, 22 N.Y.2d 672, 673, 291 N.Y.S.2d 366, 367, 238 N.E.2d 754 (1968). This rule does not apply to the facts of the instant case, however.

In both *Baker* v. *Drake*, 53 N.Y. 211 (1873) and *Mayer* v. *Monzo*, 221 N.Y. 442, 117 N.E. 948 (1917), cases relied upon by appellants, it was alleged that stockbrokers sold their principal's stock without authorization. The owners of the stock were holding these securities, hoping to realize a profit from their sale. *Baker* v. *Drake, supra*, 53 N.Y. at 216. The *Baker* court explained the theory on which damages

would be awarded when stock held for this purpose was converted.

> If, upon becoming informed of the sale, he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity.

Baker v. *Drake, supra,* 53 N.Y. at 217.

The situation presented in the instant case is wholly different from the circumstances existing in *Baker* and its progeny. Here, appellants never owned any common stock of Boeing and do not claim to have purchased any. *See Hartford Accident & Indemnity Co.* v. *Walston & Co., supra,* 22 N.Y.2d at 673, 291 N.Y.S.2d 366, 238 N.E.2d 754. In reality, appellants are asking us to treat them as if they were owners of the stock on the cut-off date, March 29, and to speculate that they would have sold these shares at the highest price reached within a reasonable time thereafter. Such a theory of damages was specifically rejected in *Simon* v. *Electrospace Corp.*, 28 N.Y.2d 136, 145, 320 N.Y.S.2d 225, 269 N.E.2d 21 (1971).

[2] In our former opinion we held that appellants' right to damages arose out of their contract with Boeing. *Van Gemert* v. *Boeing Co., supra,* 520 F.2d at 1383. We are confident that, faced with the facts presented here, the New York courts would apply a breach of contract theory of damages, resulting in the Boeing stock being valued as of the cut-off date, March 29, 1966. In *Simon* v. *Electrospace*

Corp., supra, the defendant breached its contract to deliver shares of stock to the plaintiff for services rendered. The *Simon* court stated:

> The proper measure of damages for breach of contract is determined by the loss sustained or gain prevented at the time and place of breach . . . . The rule is precisely the same when the breach of contract is nondelivery of shares of stock . . . . Plaintiff was never the owner of the stock of Electrospace just because defendant breached its contract to deliver the shares. That breach and the loss caused was fixed and determined in 1967 . . . [and that was] the time when the value to him of defendant's performance was to be measured. It was then that plaintiff was to be made whole and not at some future time never specified in the agreement. (Citations omitted).

Simon v. *Electrospace Corp., supra,* 28 N.Y.2d at 145, 320 N.Y.S.2d 225, 232-233, 269 N.E.2d 21, 26. The cases dealing with converted stock were referred to by the *Simon* court but did not control, because there, as here, the plaintiff did not own the stock. Boeing had the right to call the debentures as of March 29, 1966. However, it breached its contract with the debenture holders by failing to give them reasonably adequate notice of its action, thereby precluding them from participating in the call. We hold that the breach occurred on March 29, 1966; and, for the purpose of computing damages herein, the Boeing stock should be valued as of that date.

New York law also controls on the issue of pre-judgment interest. Appellants contend that the awarding of interest is mandatory under N.Y.C.P.L.R. § 5001(a). Boeing, on the other hand, asserts that our previous decision in effect reformed the contract between it and the debenture holders. Because reformation is an equitable doctrine, *see Brand-*

wein v. *Provident Mutual Life Insurance Co.*, 3 N.Y.2d 491, 494, 168 N.Y.S.2d 964, 146 N.E.2d 693 (1957), Boeing argues that the awarding of interest was discretionary with the District Court.

[3, 4] Boeing's reliance on the doctrine of reformation is misplaced. In our prior decision, we did not rely on a mutual mistake between the parties in expressing the terms of their agreement. Neither did we find unilateral mistake on the part of the debenture holders occasioned by Boeing's fraud. We did find significant, however, the fact that the debentures did not explicitly set forth the type of notice which appellants could expect if Boeing decided to call the bonds. Without such a declaration, we held as a matter of law that appellants were entitled to expect that Boeing would employ a method of notification reasonably calculated to inform the debenture holders of the call. In doing so, we merely applied the settled principle, "that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . ." *Kirke La Shelle Co.* v. *Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933). Simply stated, every contract contains the implied requirement of good faith and fair dealing. Boeing was found liable therefore because it breached its contract with appellants, and damages were awarded. Under N.Y.C.P.L.R. § 5001(a), an award of interest from the date of the breach, March 29, 1966, is mandatory. *See Spang Industries, Inc.* v. *Aetna Casualty & Surety Co.*, 512 F.2d 365, 371 (2d Cir. 1975).[1]

[1] On remand, the District Court should compute interest at the various legal rates applicable under New York law during the period from March 29, 1966 to the date that judgment is entered. *Spang Industries, Inc.* v. *Aetna Casualty & Surety Co., supra*, 512 F.2d at 372; *see Kaufman* v. *Chase Manhattan Bank National Association*, 370 F.Supp. 279, 280 (S.D.N.Y. 1974).

[5] On March 30, 1966, $1,544,300 in principal amount of unregistered debentures had not been converted. Therefore the class as a whole suffered damages of $3,289,359, exclusive of pre-judgment interest. This sum with interest represents the maximum amount to be distributed should all possible class members be identified and file proofs of claim. On appeal, certain appellants raise the question of whether class members who file proper proofs of claim should be entitled to receive on a pro rata basis any portion of the damage award which remains unclaimed. Boeing, of course, contends that the unclaimed money should be returned to the corporation.

We see no reason to change our position, firmly stated in *Eisen* v. *Carlisle & Jaquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), disallowing a "fluid class" recovery such as sought by appellants. Although, in *Eisen*, the fund created by the unclaimed damages was to be used to benefit individuals who were arguably not members of the class, there is no difference in concept between the relief at issue in that case and the relief requested here, which in effect seeks distribution of the unclaimed portion to a "next-best" class. Moreover, there is even less to recommend appellants' proposal than the similar relief suggested in *Eisen*.[2]

The problems inherent in appellants' proposal are readily apparent.

> [T]his method expressly contemplates that silent class members will not receive any compensation, even

[2] In *Eisen* the class consisted of those who had bought or sold odd lots on the New York Stock Exchange in the period from May 1, 1962 through June 20, 1966. The undistributed funds were to be used, "for the benefit of all odd-lot traders by reducing the odd-lot differential 'in an amount determined reasonable by the court until such time as the fund is depleted' ". *Eisen* v. *Carlisle & Jaquelin*, *supra*, 479 F.2d at 1011.

> indirectly. The claims of the silent class members would be expropriated and a windfall might result for those who appeared and collected their share of the damages. Consequently, this procedure might encourage the bringing of class actions likely to result in large uncollected damage pools. It also raises serious questions as to the adequacy of representation where the interests of the named plaintiffs lie in keeping the other class members uninformed. In sum, the deficiencies of this method of distribution make it a generally unacceptable alternative. (Footnote omitted).

Note, *Damage Distribution in Class Actions: The Cy Pres Remedy,* 39 U.Chi.L.Rev. 448, 453 (1972). Appellants argue, however, that they should receive the unclaimed funds to defray the legal expenses of the claiming members of the class; in essence, that Boeing should pay, at least in part, their legal fees and disbursements. The simple answer to this argument is that, what appellants may not gain directly, *see Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), they may not gain indirectly, and certainly not through such an imperfect vehicle as they have proposed. Without regard to the constitutionality of a "fluid class" award, *Eisen* v. *Carlisle & Jaquelin, supra,* 479 F.2d at 1018, the circumstances here simply do not call for this extraordinary remedy.

The case is remanded to the District Court for entry of a judgment in accordance with this opinion.

APPENDIX E

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 321-25—September Term, 1974.

(Argued February 26, 1975 Decided July 14, 1975.)

Docket Nos. 74-1157-59, -1165, -1185

WILLIAM R. VAN GEMERT, et al.,

Appellants,

—v.—

THE BOEING CO., et al.,

Appellees.

Before:

LUMBARD, OAKES and TIMBERS,

Circuit Judges.

Suit by holders of convertible debentures who failed to convert prior to company's redemption claiming insufficient notice of redemption provided. The United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge,* held that the notice provided by the company complied with the provisions in the debenture and underlying Trust Indenture; that the Trust Indenture Act of 1939 and the company's Listing Agreement with the New York Stock Exchange were not violated; and that appellants had no standing to raise a claim based upon an alleged failure to make a necessary adjustment in the

conversion rate. Held, that the appellants had stated a valid claim.

Judgment reversed.

STUART D. WECHSLER, KASS, GOODKIND, WECHSLER & GERSTEIN, New York, N.Y.; Sachnoff, Schrager, Jones & Weaver, Ltd., Chicago, Ill.; Elson, Lassers & Wolfe, Chicago, Ill., *for Appellants.*

NORMAN WINER, NATHAN, MANNHEIMER, ASCHE, WINER & FRIEDMAN, New York, N.Y., *for Appellants.*

S. HAZARD GILLESPIE, DAVIS POLK & WARDWELL, New York, N.Y. (David E. Wagoner, Perkins, Coie, Stone, Olsen & Williams, Seattle, Wash., William H. Levit, Jr., Hughes, Hubbard & Reed, Los Angeles, Cal., of counsel), *for Appellees.*

OAKES, *Circuit Judge:*

This appeal is from a judgment dismissing the amended complaint in a consolidation class action brought by non-converting holders of The Boeing Company's "4½% Convertible Subordinated Debentures, due July 1, 1980." The complaint was jurisdictionally based on the Securities Exchange Act of 1934 as amended, the Securities Act of 1933 as amended, the Trust Indenture Act of 1939 as amended and the principles of pendent jurisdiction.[1] The gist of the complaint was that the appellants and their class had inadequate and unreasonable notice of Boeing's intention to redeem or "call" the convertible debentures in question and were hence unable to exercise their conversion

1 *See* note 19 *infra.*

rights before the deadline in the call of midnight, March 29, 1966. Their damage lay in the fact that the redemption price for each $100 of principal amount of debentures was only $103.25, while under the conversion rate of, at a minimum, two shares of common stock for each $100 of principal amount of debentures, the stock was worth $316.25 on March 29, 1966, the cut-off date for the exercise of conversion privileges, or within 30 days thereafter, $364.00. The named appellants number 56, and the total loss alleged is over $2 million.

The United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge,* held that Boeing complied with the notice provisions spelled out in the debentures and in the Indenture of Trust Dated July 1, 1958 (the Indenture), between Boeing and The Chase Manhattan Bank (Chase), Trustee, and that it was required to do no more; that the Trust Indenture Act of 1939, 15 U.S.C. §§77aaa *et seq.*, was not violated; that if Boeing's Listing Agreement with the New York Stock Exchange (NYSE) were violated, it gave appellants no claim for relief; and that even if, as appellants claim, an adjustment in the conversion rate were required, and that failure to make the adjustment gave rise to a cause of action, appellants had no standing to raise the claim since they did not exercise their conversion rights. We reverse and remand on the ground that there was an obligation on Boeing's part to give reasonably adequate notice of the redemption to the debenture holders, which obligation was not fulfilled in this instance.

Most of the facts are not in dispute; indeed, we commend the parties, and the court below, for agreeing to a 59-page statement as to facts, incorporating some 55 exhibits, and to what certain witnesses would testify if called at trial.

THE ISSUE OF DEBENTURES

On July 15, 1958, each Boeing shareholder was given the right to purchase $100 of convertible debentures for each 23 shares of stock then held.[2] The debentures were to pay interest of 4½ per cent per annum and were to be convertible by the debenture-holder into common stock at a rate (subject to adjustment) of two shares per $100 principal amount of debentures. Chase was appointed trustee under the Indenture Agreement, and the debentures, as well as the stock reserved for issuance upon conversion of the debentures, were listed on the NYSE. Application for such listing had been made pursuant to a Listing Agreement between Boeing and the Exchange.

Subscriptions for a total of $29,578,500 of debentures were received[3] and the balance of $1,019,100 was purchased by the underwriters. Chase as trustee then authenticated and the subscription agent delivered by registered mail the entire $30,597,600 aggregate amount of debentures in coupon form to the persons designated in the warrants surrendered or their agents,[4] but no list of these was kept by Boeing or Chase.[5]

2 Total trading in the debenture rights was 1,702,200, but since no information is available on the number or retrades there is no way of knowing exactly how many rights were not traded. At the least, however, 5,335,248 rights were not traded on the Exchange.

3 One may estimate, from the number of rights not traded on the Exchange, approximately $21 million worth of the debentures were purchased by Boeing stockholders or their donees.

4 Between August 4, 1958, when the debentures were admitted to trading on the NYSE, and March 29, 1966, when conversion rights expired, a total of $68,694,000 face amount of debentures were traded. It is not known how many of the debentures were held by original subscribers at the later date.

5 City Bank-Farmers Trust Company, the subscription agent, retained through the ultimate date on which conversion rights expired the names and addresses of stockholders to whom the warrants were sent, as well as lists of the names and addresses of stockholders of record for the payment of dividends in May and August of 1958, and the warrants themselves when they were tendered. Although the list of stockholders was destroyed in 1964, the warants which bear the names and addresses of the original subscribers are presently in the possession of a successor agent.

A number of provisions in the debenture, the Indenture Agreement, the prospectus, the registration statement for the debentures and the Listing Agreement with the NYSE dealt with the possible redemption of the debentures by Boeing and the notice debenture-holders were to receive of a redemption call so that they might timely exercise their right to convert the debentures into common stock rather than have their debentures redeemed at face value. The debentures themselves provided:

> The holder of this Debenture is entitled, at his option, at any time on or before July 1, 1980, or in case this Debenture shall be called for redemption prior to such date, *up to and including but not after the tenth day prior to the redemption date, to convert this Debenture* . . . at the principal amount hereof, or such portion hereof, into shares of Capital Stock of the Company . . .
>
> . . . .
>
> The Debentures are *subject to redemption* as a whole or in part, at any time or times, at the option of the Company, *on not less than 30 nor more than 90 days' prior notice, as provided in the Indenture,* at the following redemption prices (expressed in percentages of the principal amount) . . .
>
> . . . .
>
> This Debenture may be registered as to principal upon presentation at the office or agency of the Company, in the Borough of Manhattan, The City of New York, New York, . . .

(Emphasis added.)

The Indenture itself, a 113-page printed booklet, provides in Art. V, § 5.02, as follows:

> In case the Company shall desire to exercise the right to redeem all or any part of the debentures, as the case may be, pursuant to Section 5.01, it shall publish prior to the date fixed for redemption a notice of such redemption at least twice in an Authorized Newspaper, the first such publication to be not less than 30 days and not more than 90 days before the date fixed for redemption. Such publication shall be in successive weeks but on any day of the week. . . .[6]

The Indenture also provided that debenture-holders who registered their bonds would receive notice by mail of any redemption call by the Boeing directors.

While the prospectus for the debenture issue did not refer to any registration rights, it did state that redemption could occur "on not less than 30 days' and not more than 90 days' published notice."

The NYSE Listing Agreement dated November 5, 1957, incorporated by reference into the listing application filed by Boeing in respect to the debenture issue, provided in Part III, Paragraph 4, as follows:

> 4. The Corporation will *publish immediately to the holders* of any of its securities listed on the Exchange *any action taken* by the Corporation *with respect* to dividends or to the allotment of rights to subscribe or *to any rights or benefits pertaining to the ownership of its securities listed on the Exchange;* and will give prompt notice to the Exchange of any such action; and *will afford the holders of its securities listed on the*

[6] An "Authorized Newspaper" is defined as one published at least five days a week and of general circulation in the borough of Manhattan, N.Y. *See* Indenture, Art. I, § 1.01.

> *Exchange a proper period within which* to record their interests and *to exercise their rights.* . . .

(Emphasis added.)

Section A10 of the NYSE "Company Manual" specifically defines what is meant by publicity in the Listing Agreement:

> Publicity: *The term "publicity,"* as used . . . below, and *as used in the listing agreement* in respect of redemption action, *refers to a general news release, and not to the formal notice or advertisement of redemption* sometimes required by provisions of an indenture or charter.
>
> *Such news release shall be made as soon as possible after corporate action which will lead to, or which looks toward, redemption* is taken . . . and shall be made by the fastest available means, i.e., telephone, telegraph or hand-delivery.
>
> To insure coverage which will adequately inform *the public,* the news should be released to at least *one or more newspapers of general circulation in New York City which regularly publish financial news,* or *to one or more of the national news-wire services* (Associated Press, United Press International), in addition to such other release as the company may elect to make.

Section A10 of the Company Manual also provides specifically that when a convertible security is to be redeemed, the news release must include the rate of conversion and the date and time when the conversion privilege expires. It further provides that in addition to the immediate news release the company must give notice immediately to the NYSE itself, so as to enable the NYSE to take any necessary action with respect to further trading in the security.

THE CALL AND ITS CIRCUMSTANCES—HEREIN OF THE NOTICE ACTUALLY GIVEN

On February 28, 1966, the Boeing board of directors *inter alia* authorized the president, vice president-finance or treasurer to call for redemption on a date to be selected by them or any one of them, all of the convertible debentures outstanding under the indenture of July 1, 1958. That same day a news release, headlining 1965 sales and net earnings, and referring to a contemplated stock increase, stock split and post-split dividends, mentioned that "[t]he company's management was also authorized to call for redemption at a future date all of company's outstanding 4½ percent convertible subordinated debentures." This statement, which did not mention even the tentative dates for redemption and expiration of the conversion rights of debenture holders that had been settled upon, was released by the Boeing "News Bureau" nationally to the financial editors of the New York Times, the New York Herald-Tribune, the Wall Street Journal and other major national newspapers, in addition to the major wire services (Associated Press, United Press International and Dow Jones & Co.).

A short time after the February 28 board meeting, Boeing firmed up the key dates, complied with the indenture notice requirements and communicated to some extent with the Exchange proper. On March 2, 1966, at the home office in Seattle, at a meeting of Boeing officers, bankers and lawyers, it was decided to fix March 8 as the date for the first publication of the formal notice of redemption, April 8 as the redemption date and March 29 as the date for expiration of the conversion privilege. The second date for publication of the formal notice, March 18, was also fixed upon at this March 2 meeting, and Chase was notified to publish the redemption notice on those dates in all editions of the Wall Street Journal. All editions of the Journal carried the formal notices on March 8 and 18; the notices were in due form if not of extensive size.[7] It is conceded by the appellants that the formal requirements of the Indenture were met by the Company and Trustee.

It was not until March 7, the day before the publication of the first formal notice of redemption, that the NYSE was itself notified of the firmed-up dates for redemption,[8] conversion and notice. This was done by a telephone call from Company counsel in Seattle to the Exchange. While the court below found in part that "Boeing did comply with the publicity requirements of the Exchange" and while Company counsel "felt" on the basis of his telephone call "that we had complied with the recommended procedures [of the Stock Exchange Manual]," this finding and feeling are in the face of Boeing's response *admitting* appellants' demand for admission

> That Boeing did not issue any general publicity release, as that term is defined in Section A-10 of the New York Stock Exchange Company manual, concerning the call of the debentures during the period from March 1, through March 24, 1966.

This admission was reconfirmed by counsel for Boeing below and on appeal in the course of an "opening" statement to the court. The original news release of February 28 did not qualify since the dates of conversion and redemption had not been fixed and the Manual requires in the case of convertible securities that the publicity set forth "the rate of conversion and the date and time when the conversion privilege will finally expire" and that if

---

7 We estimate their size as 5" x 5½".

8 The Exchange had been sent a communication concerning the redemption on March 1, 1966, but at that time no redemption date had been established.

such data are not known at the time publicity is given initially, "similar publicity shall be given immediately it becomes known or determined." The formal notices did not qualify since the Manual refers to a "general news release," and not to the formal notice or advertisement of redemption. In this regard it is interesting to note that a letter dated March 9 from the stock list department of the Exchange to Boeing indicates that "We have noted the recent advertisement advising of the call for redemption" and also asks for a copy of the authorizing resolution.

There was, in short, no general news release as called for by the Listing Agreement as amplified in the Company Manual until on the eve of expiration of the conversion rights, March 25, 1966, it appeared that $10,849,300 face amount of debentures—over one-half of those outstanding at that time—remained unconverted. At that point Boeing issued a press release[9] and then on March

9 DEBENTURE CONVERSION DATE MARCH 29

Final date for conversion of The Boeing Company's 4½ per cent convertible subordinated debentures to Boeing common stock is Tuesday, March 29, as announced in advertising by the company on March 8, 9 and 10.

The conversion rights provide for issuance of two shares of common stock in the company for each $100 bond. The company's notice of redemption announced that all outstanding debentures would be redeemed on or after April 8 at the redemption price of 103.25 per cent of their principal amount, together with accrued interest to that date.

Closing price of the stock as of March 25 was $154.5, representing a substantial advantage to holders of the bonds if the conversion is elected.

From January 1, 1965 through March 25, 1966, the sales price for the common stock of The Boeing Company ranged from a high of $175.25 to a low of $60.375 per share. As was pointed out in the notice of redemption, so long as the market price of the common stock is $52.24 or more per share, a debenture holder would receive upon conversion before the March 29 deadline, common stock having a greater value than the cash he would receive if he surrendered the debenture for redemption.

28 the Company republished its earlier advertisement in all editions of the Wall Street Journal (Eastern, Mid-Western, Pacific Coast and South-West) and the New York Times, and additionally advertisements were placed. This later action had what the court below termed a "dramatic and widespread rippling effect." Some $9,305,000 of debentures were converted on March 28 and 29. The ripples, however, had not spread to the appellants' class by the midnight deadline on the 29th; they literally went to sleep with $1.5 million of debentures that were worth $4 million if only converted.

It is true, however, and the court did properly find, that in addition to the publication of the two formal indenture notices, notices of the dates of the call and the expiration of the conversion privilege on March 29, 1966, were carried on the following services: NYSE ticker on March 8, 23, 24, 25, 26 and 28, 1966; NYSE Bulletin on March 11, 18 and 25, 1966; The Commercial and Financial Chronicle on March 14, 21 and 28, 1966; Standard & Poor's Bond Outlook on March 19, 1966; Standard & Poor's Called Bond Record on March 9, 11, 18 and 25, 1966; Moody's Industrials on March 11, 1966. Articles about these dates were also carried in the Seattle Post Intelligencer on March 25, 1966; the Seattle Times on March 27, 1966; and the Financial World on March 23, 1966; and the notice was also carried in the Associated Press Bond Tables published on one or more days in at least 30 newspapers published in major cities across the United States. But almost all of these notices or items were in fine print, buried in the multitude of information and data published about the financial markets and scarcely of a kind to attract the eye of the average lay investor or debenture holder. On March 9, 1966, the listing in the New York Times for the convertible debentures read, for example: "Boeing cv 4½ s 80." The change

on March 10 was to "Boeing 4½ s 80 cld," giving the investor in Dubuque or Little Rock or Lampasas only 19 days to pick up this change and figure that "cld" meant "called." Proof of the inadequacy of these notices lies in the fact that, despite the dramatic disparity between the value of the debentures unconverted and the conversion stock, over one-half of the debentures outstanding on the date of the first notice remained unconverted until the general publicity release on the eve of expiration of the conversion privilege.[10]

Because the appellants place some emphasis on the fact, although we do not reach their contention of unreasonable notice based on it, we should mention that Boeing made no attempt to mail notice to the original subscribers (which could have been done at concededly nominal expense), and neither Boeing nor Chase inquired of or gave notice to collecting banks which had tendered for collection coupons bearing the payment dates of July 15, 1965, or January 15, 1966, the last two coupons before the redemption, either of which might have had some beneficial effect.[11]

THE CONTENTIONS OF THE PARTIES

Boeing rests its defense primarily upon the notice specified in the debentures and Indenture, pointing out that in 1958 when the debentures were issued, "the risk that actual notice might not be received by subsequent holders of the debentures was clearly accepted by all even re-

10 On March 8, 1966, $21,514,700 face amount of debentures were still outstanding. On March 25, 1966, as stated, four days before the expiration of the conversion privilege, over one-half of these $10,849,300, had not been converted.

11 Nor do we reach the legal argument under the Trust Indenture Act, 15 U.S.C. § 77bbb, based upon the Indenture's provisions requiring Boeing to give Chase lists of the names and addresses of debenture holders obtained by the former, and the token compliance therewith.

motely familiar with the nature of such debentures." (Brief at 20-21.) It was "just such a risk" that led Boeing to extend to its stockholders and others who were investing $30 million in these securities the opportunity to register, *see Kaplan* v. *Vornado, Inc.*, 341 F. Supp. 212, 216 (N.D. Ill. 1971), an opportunity availed of by only 7 per cent of the debenture holders.[12] For the proposition that notice by publication provided for here was "standard and conformed with the custom and practice prevailing in the trade in 1958," we are referred by Boeing to *Gampel* v. *Burlington Industries, Inc.*, 43 Misc. 2d 820, 252 N.Y.S.2d 500 (Sup. Ct. 1964), where Justice Korn did not discuss the custom and practice in the trade but did hold that publication in the Wall Street Journal even during a newspaper delivery strike conformed to a provision in the Burlington Industries debentures similar to the one in the case at bar.[13]

There are four main strings to the appellants' bow. The first is that Boeing is civilly liable under federal law for violation of the NYSE Listing Agreement and Section A10 of the NYSE Company Manual since their requirements are an extension of the Securities Exchange Act of 1934 and an integral part of the statutory scheme under which exchanges are required to adopt rules, 15 U.S.C. § 78f, which may be ordered by the Commission to be altered, 15 U.S.C. § 78s, and the violation of which may give rise to a civil action under federal law. *Cf. Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135 (7th Cir.), *cert. denied*, 396 U.S. 838 (1969). The second

12 Through April 8, 1966, $1,838,000 in face amount of the debentures were registered as to principal and interest and $337,700 as to principal only; thus, approximately 7 per cent of the debentures were in fact registered so that their holders thereby automatically received notice from the trustee.

13 *See generally* Miller, *How to Call Your Convertibles*, Har. Bus. Rev. 66 (May/June 1971).

is that appellants are third party beneficiaries under state law of the Boeing-NYSE Listing Agreement, as amplified by the Company Manual. *Lawrence* v. *Fox,* 20 N.Y. 268 (1859). *See Weinberger* v. *New York Stock Exchange,* 335 F. Supp. 139 (S.D.N.Y. 1971) (Gurfein, *J.*) (Exchange liable under agreement with SEC to limited partner of bankrupt member firm inadequately supervised by Exchange). The third claim of appellants is that the Indenture is in the nature of a contract of adhesion, a standardized contract between parties of disparate bargaining power, unconscionable features of which are unenforceable as a matter of policy, a concept perhaps first advanced as to indentures of trust covering convertible debentures in a student note, *Convertible Securities: Holder Who Fails to Convert Before Expiration of the Conversion Period,* 54 Cornell L. Rev. 271 (1969). *Cf. Gray* v. *Zurich Insurance Co.,* 65 Cal.2d 263, 269, 419 P.2d 168, 171, 54 Cal. Rptr. 104, 107 (1966). *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract,* 43 Colum. L. Rev. 629 (1943). The fourth ground is that the call was illegal and therefore void because it was based upon a conversion rate of 2.00 shares per $100 face amount of debentures when as a result of two stock dividends and an acquisition it should have been on a 2.05 or a 2.08 ratio.

THE FEDERAL LAW CLAIM

The claim that Boeing is civilly liable under federal law for violation of the NYSE Listing Agreement and Section A10 of the Company Manual is a colorable one. The Listing Agreement and Company Manual are "instruments corresponding" to rules of the Exchange within Section 6(a)(3) of the Securities Exchange Act of 1934, 15 U.S.C. § 78f(a)(3). For the debentures here in question to be listed on the Exchange, application under the Listing

Agreement had to be made. Boeing did not comply with the publicity requirements of the Exchange. In *O'Neill* v. *Maytag,* 339 F.2d 764, 770 (2d Cir. 1964), we did say, however, in the context of a stockholder's derivative suit arising out of an air carrier's purchase of its own stock, that a transaction which violated an Exchange rule did not give rise to a cause of action under federal law, at least against a listed company or its officers.

But as the Supreme Court held in *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), private parties have both derivative and direct rights of action to bring suit for violations of the Securities Exchange Act of 1934 and SEC rules and regulations issued thereunder, rights the explication of which take up a fair amount of Second Circuit judicial time. We extended this at least by dictum to include violation of stock exchange and securities dealers' association rules designed for the direct protection of investors, at least in a suit against an Exchange member, in *Colonial Realty Corp.* v. *Bache & Co.,* 358 F.2d 178 (2d Cir.), *cert. denied,* 385 U.S. 817 (1966). There, Judge Friendly, speaking for a unanimous court, pointed out that "the concept of supervised self-regulation is broad enough to encompass a rule which provides what amounts to a substitute for a regulation by the SEC itself." 358 F.2d at 182. Again, "[a] particular stock exchange rule could thus play an integral part in SEC regulation notwithstanding the Commission's decision to take a back-seat role in its promulgation and enforcement . . . ," *id.,* giving as an example NYSE Rule 452 which prohibits a member from voting stock held in a street name without specific instructions from the beneficial owner. *Id.* at n.4. Judge Friendly then went on to say that

> what emerges is that whether the courts are to imply federal civil liability for violation of exchange or dealer association rules by a member cannot be deter-

> mined on the simplistic all-or-nothing basis urged by the two parties; rather, the court must look to the nature of the particular rule and its place in the regulatory scheme, with the party urging the implication of a federal liability carrying a considerably heavier burden of persuasion than when the violation is of the statute or an SEC regulation. The case for implication would be strongest when the rule imposes an explicit duty unknown to the common law.

Id.[14] *See* Lowenfels, *Liability under Exchange Rules*, 2 Rev. of Securities Regulation 841 (1969). *See also Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc., supra* (upholding implied private right based upon the so-called "Know Your Customer" rule, which is Rule 405 of the NYSE, against a party not a stock exchange member).

Nevertheless, we do not now take the position that appellees advance and the court below apparently accepted, that violation of an exchange rule cannot under any circumstances give rise to civil liability under the federal acts. Such a position would be in conflict with our own most recent statements on this subject as well as some of the developing case law. *See, e.g.*, Judge Weinfeld's opinion in *Starkman* v. *Seroussi*, CCH Fed. Sec. L. Rep. ¶ 94,600 [1973-74 transfer binder] (S.D.N.Y. 1974) (con-

14 The court went on to hold, however, that the rules at issue in *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966), were "near the opposite pole," that is to say, they were "something of a catchall" which related to unethical behavior as well as illegal conduct. It is to be noted that *Colonial Realty* was not the first Second Circuit case dealing with stock exchange rules. In *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), the court recognized that culpable failure by a stock exchange to enforce rules adopted pursuant to § 6(b) of the Securities Exchange Act might give rise to a federal claim against the *exchange* by an investor injured thereby. *See also Silver* v. *NYSE*, 302 F.2d 714, 719 (2d Cir. 1962), *rev'd on other grounds*, 373 U.S. 341 (1963).

duct in violation of Rule 345.17 of the Exchange prohibiting registered representatives from guaranteeing any customer against loss in his account or receiving a share in the profits or sharing in the losses of a customer's account, held actionable); *SEC* v. *First Securities Co. of Chicago*, 463 F.2d 981 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972) (violation of NASD rule protecting public gives rise to private damage action). *Cf. Landy* v. *Federal Deposit Insurance Corp.*, 486 F.2d 139, 164-66 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

It would also run contrary to a position we find inviting, that to the American investing public listing on the New York Stock Exchange carries with it implicit guarantees of trustworthiness. The public generally understands that a company must meet certain qualifications of financial stability, prestige, and fair disclosure, in order to be accepted for that listing, which is in turn so helpful to the sale of the company's securities. Similarly it is held out to the investing public that by dealing in securities listed on the New York Stock Exchange the investor will be dealt with fairly and pursuant to law. This would be particularly true as to the convertible securities market which differs from the market for other corporate debt in that it is composed primiraly of individuals. *See* 1A Dewing, The Financial Policy of Corporations 268-71 (5th ed. 1953).[15] Some investors miss the notices of redemption

15 The aggregate amount of convertible bonds outstanding of companies listed on the New York Stock Exchange in March of 1963, according to Standard & Poor's Earnings and Rating Bond Guide, was $2,300,000,000, of those listed on the American Stock Exchange $92,000,000, and of unlisted companies $880,000,000. *See* 2 Report of Special Study of Securities Markets made pursuant to Section 19(d) of Securities Exchange Act of 1934 at 23. The Commission is well aware that individual shareholders to whom rights to subscribe to debentures are distributed by the corporations have no control over the time of distribution or whether there should be a distribution. Hence they are "participating in the market involuntarily, so to speak . . . ." *Id.* at 24.

and of expiration of conversion rights, while others "do not know that they should look for them." Note, 54 Cornell L. Rev. at 274 n.16.[16]

Appellees argue, however, that the self-regulation system of the 1934 Act applies in its terms only to Exchange *members*, as opposed to *issuers*, and that the legislative history indicated congressional intention not to extend coverage of the Exchange rules and regulations to issuers. In this connection appellees maintain that Congress did consider such an extension as evidenced by a proposed § 12(b)(1) to the Securities Exchange Act quoted in Cong. Rec. 8584 (1934), which was never adopted. *Id.* at 8586. The provision, however, was to require listed companies to agree with the Exchange to comply with the Exchange Act and the Commission's rules and regulations, and much of the debate related to whether the provision was necessary at all since such companies would have to comply with the law regardless of any such agreement.[17] Omitting the section

16 Cases involving generally broad standards of conduct and having nothing to do with disclosure, *see, e.g., Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified on other grounds*, 430 F.2d 1202 (9th Cir. 1970), require the presence of fraud to create a right of action under federal law, but this is because the only action or conduct proscribed by the rule is fraudulent conduct. Here, however, is involved a notice or notification rule.

17 Senator Hastings made the following statement in connection with the legislation:

> I do not quite understand why they want to get the issuer of the security on record, in the form of an agreement, not to violate a particular law, because it must be admitted that, if the law itself is valid, and if the rules and regulations made by the commission are valid, and the person entering into the agreement has brought himself within the law by offering his securities for sale, then certainly, it seems to me, the point of compelling him to sign a paper that he will abide by the laws and rules made by the commission must have back of it something which those of us who studied the bill do not quite understand.

78 Cong. Rec. at 8585 (1934). While Senator Hastings' amendment was defeated, the language he objected to was deleted in conference.

in question would apparently indicate merely a recognition that the provision was unnecessary. The legislative history is thus at most equivocal on the question whether Congress intended to insulate issuers from liability in the event that they violated an Exchange rule.[18]

Appellees argue also that the Exchange's remedies are limited to delisting. *See* Report of Special Study of Security Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., 1st Sess., Pt. IV, ch. XII at 566-67; *Intercontinental Industries, Inc.* v. *American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972) (permitting delisting). But no authority holds that the exclusive remedy against a listed company is delisting. The claim for relief is sufficient for jurisdictional purposes in any event.[19]

18 Provisions of the Listing Agreement requiring the corporation to, *e.g.*, "promptly notify the Exchange of any changes of officers or directors," Part I, 2, would not seem to give rise in any event to a liability to a securities holder. The provisions of the Listing Agreement here in question, however, were to "afford the holders of its securities listed on the Exchange a proper period within which . . . to exercise their rights . . . ."

19 *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 724 (1966). *See Hudak* v. *Economic Research Analysts, Inc.*, 499 F.2d 996, 1001 (5th Cir. 1974); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123, 129 (7th Cir. 1972). The writer of the opinion for himself alone would hold that even if there were such a duty it would be essentially coterminus with a contractual duty to the appellants as third party beneficiaries. As he views it, the limited notification provisions of the Indenture and debenture were modified by virtue of the application for listing on the stock exchange, which specifically incorporated by reference the Listing Agreement of November 5, 1957, to which we have so frequently alluded. *See Lawrence* v. *Fox*, 20 N.Y. 268 (1859); *Seaver* v. *Ransom*, 224 N.Y. 233, 120 N.E. 639 (1918); *Weinberger* v. *NYSE*, 335 F. Supp. 139 (S.D.N.Y. 1971). The duty of a listed company to its own securities holders to treat them fairly is founded in fundamental concepts of the law pertaining to corporate fiduciaries. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Pepper* v. *Litton*, 308 U.S. 295 (1939); *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973). Security holders of a

THE INADEQUACY OF THE BOEING NOTICE

The notice Boeing gave, we hold, had two deficiencies. First, Boeing did not adequately apprise the debenture holders what notice would be given of a redemption call. Investors were not informed by the prospectus or by the debentures that they could receive mail notice by registering their debentures, and that otherwise they would have to rely primarily on finding one of the scheduled advertisements in the newspaper or on keeping a constant eye on the bond tables. Second, the newspaper notice given by Boeing was itself inadequate.

The first factor we think highly significant. Many of the debenture holders might well have decided to register their bonds, had the significance of registration, or of the failure to register, been brought home in the materials generally available to the purchasers of the debentures. No detailed information as to notice was given on the face of the debentures, even in the fine print. The debentures stated simply:

> The debentures are subject to redemption, as a whole or in part, at any time or times, at the option of the Company, in not less than 30 nor more than 90 days' prior notice, as provided in the Indenture . . .

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corporation are in a very real sense creditor beneficiaries, *see* 1 Restatement of Contracts § 136 (1932), to whom an underlying duty of fair treatment is owed by the corporation or majority stockholders or controlling directors and officers thereof. While it may be said that the Indenture itself is a contract, *Kaplan* v. *Vornado, Inc.*, 341 F. Supp. 212 (N.D. Ill. 1971); *Buchman* v. *American Foam Rubber Corp.*, 250 F. Supp. 60 (S.D.N.Y. 1965), it was clearly entered into with listing on the NYSE in mind and was substantially simultaneous in execution and coordinate in operation with the listing application. On this basis it would be unnecessary in the writer's view to reach the ground upon which the court relies, but since this view is individual only, he joins in the ground for decision taken.

There was no indication that registration would mean that a debenture holder would receive mail notice. Nor was there any indication of the extent of newspaper notice to be provided—either as to the papers that would be used or how often the notice would be published. Debenture holders were simply referred by the debenture, as well as by the prospectus, to the 113-page Indenture Agreement, which, to be sure, was available to debenture holders or prospective purchasers upon request, but which was not circulated generally with the warrants or debentures.

We have dwelt at length in the facts on the newspaper notice actually given. While it may have conformed to the requirements of the Indenture it was simply insufficient to give fair and reasonable notice to the debenture holders.

The duty of reasonable notice arises out of the co. 'ract between Boeing and the debenture holders, pursuant to which Boeing was exercising its right to redeem the debentures. An issuer of debentures has a duty to give adequate notice either on the face of the debentures, *Abramson* v. *Burroughs Corp.*, CCH Fed. Sec. L. Rep. [1971-72 transfer binder] ¶ 93,456 (S.D.N.Y. 1972) (Lumbard, *C.J.*, sitting by designation), or in some other way, of the notice to be provided in the event the company decides to redeem the debentures. Absent such advice as to the specific notice agreed upon by the issuer and the trustee for the debenture holders, the debenture holders' reasonable expectations as to notice should be protected.

For less sophisticated investors (it will be recalled that warrants for the purchase of debentures were issued to *all* Boeing shareholders), putting the notice provisions only in the 113-page Indenture Agreement was effectively no notice at all. It was not reasonable for Boeing to expect these investors to send off for, and then to read under-

standingly, the 113-page Indenture Agreement referred to in both the prospectus and the debentures themselves in order to find out what notice would be provided in the event of redemption.

Boeing could very easily have run more than two advertisements in a single paper prior to the eleventh hour (March 28), at which time it issued its belated news release and advertised for the third time in the Wall Street Journal and for the first time in the New York Times. Moreover, in the same period that the debentures were in the process of being redeemed, Boeing was preparing for its annual meeting (to be held April 24). Proxy materials were being prepared throughout March and were finally mailed sometime between March 24 and March 30. Management could readily have arranged the redemption dates and the proxy mailing so that notice of the redemption dates could have been included in the envelope with the proxy materials. Thus at no extra cost except that of printing brief notices, at least all Boeing shareholders would have received mail notice, and presumably a significant number of the plaintiff class owned Boeing common stock, as well as debentures, in 1966. Had Boeing attempted such mail notice, or mail notice to original subscribers, and also given further newspaper publicity either by appropriate news releases or advertising earlier in the redemption period, we would have a different case and reasonable and sufficient notice might well be found.

Nothing that we have said is inconsistent with either *Abramson* v. *Burroughs Corp., supra,* or with *Kaplan* v. *Vornado, Inc., supra.* These cases are distinguishable on their facts as well as in respect to the legal arguments made.

In *Abramson* the court was presented with the claim that Rule 10b-5 was violated in connection with the sale

of certain convertible debentures. As here, a nonconverting debenture holder was suing for the amounts lost when he failed to convert before the expiration of the conversion period and he challenged the notice procedures in connection with the redemption. In *Abramson,* however, the principal contention was that there were material omissions in the *prospectus* issued in connection with the sale of the debentures. Abramson alleged that the notice provisions in the prospectus were misleading in that they omitted the nature and frequency of notice that bondholders would receive.

Judge Lumbard in *Abramson* found quite to the contrary that the face of the debentures—unlike those here—stated exactly what notice would be provided, notice which incidentally was at least twice that required here, making specific reference to publication once a week for four weeks in a newspaper of general circulation in New York and one in Detroit. Thus the Burroughs debentures in *Abramson* specifically informed the investor where and how often notice of redemption would be published so that he could make a reasonable evaluation of the likelihood that he would receive such notice or take steps to increase the chances that he would see it either by subscribing to the Wall Street Journal or the like, by contacting a broker to handle the matter for him, or by registration.[20]

The notice provisions in *Abramson* were minimal but sufficient to clear judicial approval; the notice here was

20 In *Abramson,* moreover, the court emphasized that the debentures in issue specifically stated on their face that the bonds could be registered, and if registered that notice of a call would be provided to registered holders by mail. The court therefore concluded that the nonconverting debenture holders had themselves to blame for not receiving notice. Here, there was no such explicit information on the Boeing debentures. While the debentures did state that they could be registered, as we have said, there was no indication that registration would protect the investor by providing him with notice by mail.

significantly less. Moreover, the Boeing debentures themselves were somewhat misleading. While they indicated that redemption could be made on not less than 30 days' notice, one would have had to have been, if not a lawyer, at least an experienced and knowledgeable investor, to read the fine print two paragraphs previously which said that the conversion right ran only "to and including but not after the tenth day prior to the redemption date . . . ."

In *Kaplan* v. *Vornado, Inc., supra,* where the percentage of nonredeeming debenture holders was under 3 per cent as opposed to the 7 per cent here, in addition to notices published in the New York Times in accordance with the indenture agreement there was a press release *prior* thereto which resulted in publications of the announcement of redemption in the Wall Street Journal, Women's Wear Daily, Daily News Record, Homes Furnishing Daily, and on the Reuters and Dow-Jones wire services. The court in *Kaplan* specifically found that "the essential facts of the defendant's redemption and of the termination of the holders' conversion rights were printed in these news items." 341 F. Supp. at 213.[21]

What one buys when purchasing a convertible debenture in addition to the debt obligation of the company incurred thereby is principally the expectation that the stock will increase sufficiently in value that the conversion right will make the debenture worth more than the debt. The debenture holder relies on the opportunity to make a proper conversion on due notice. Any loss occurring to him from failure to convert, as here, is not from a risk inherent in his investment but rather from unsatisfactory notification procedures. *See* Note, 54 Cornell L. Rev. at

21 The writer would note that in *Kaplan* the company did indeed comply with the NYSE Listing Agreement-Company Manual requirement of a general news release at the start of the redemption.

271. *See also* Miller, *How to Call Your Convertibles,* Harv. Bus. Rev. 66, May/June 1971.[22] The debenture holder's expectancy is that he will receive reasonable notice and it is his reliance on this expectancy that the courts will protect. *See generally* Fuller & Perdue, *The Reliance Interest in Contract Damages,* 46 Yale L.J. 52, 373 (1936-37). *See, e.g., Associated Perfumers, Inc.* v. *Andelman,* 316 Mass. 176, 55 N.E.2d 209 (1944). *See also Schlick* v. *Penn-Dixie Cement Corp.,* 507 F.2d 374 (2d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3611 (U.S. May 19, 1975). Had there been proper publication, a reasonable investor undoubtedly would have taken action to prevent the loss occurring to him.

Of course, it may be suggested that the appellee corporation itself was not the beneficiary of the appellants' loss; rather, the corporate stockholders benefited by not having their stock watered down by the number of shares necessary to convert appellants' debentures. But an award against Boeing will in effect tend to reduce *pro tanto* the equity of shareholders in the corporation and thus to a large extent those who were benefited, one might almost say unjustly enriched, will be the ones who pay appellants' loss.[23]

22 Obviously, where a conversion is not made there may be costs to the company itself which unnecessarily has to make redemption payouts. Miller, Harv. Bus. Rev. at 67. Miller goes on to say that "newspapers have *not* proved an effective conduit, and because of this the corporate officer must concentrate on the mailing approach." Perhaps one solution to the overall problem would be the English one, whereby the convertible debenture is considered converted once the total principal amount of the issue outstanding is less than 25 per cent of its original size. *Id.* at 70.

23 On the remand for a determination of damages, it might be appropriate for the district court to allow Boeing to meet the liability resulting from this case by issuing stock. That is what the plaintiffs would have had if they had received notice of the redemption call, and one of the purposes of the redemption was to enable the company

On the foregoing basis it is unnecessary for us to determine whether there is any cause of action under the Trust Indenture Act, 15 U.S.C. § 77bbb, as appellants contend. Nor, because appellants would not have standing to assert it, do we ground liability upon or make reference in the context of liability to appellants' argument that the call was illegal in the first instance because it was based upon an improper conversion rate.

DAMAGES AND THE "CONVERSION RATE"

We must, however, in remanding to the district court for a determination of damages, take note of the conversion rate argument which was rejected by the court below. That argument was essentially that the 4 per cent stock dividend declared in November, 1958, the 2 per cent stock dividend declared in November, 1959, and the acquisition by Boeing on March 31, 1960, of substantially all the assets of Vertol Aircraft Corp. necessitated an adjustment in the conversion rate of two shares of Boeing stock for each $100 of debentures in accordance with Section 4.05 of the Indenture.[24] At all times after these three transactions, Boeing treated the conversion rate as 2.0448. Because that rate was under 2.045, no adjustment was required under the Indenture § 4.05(f), which provided in part that

> Whenever the amount by which the conversion rate would be changed in accordance with the foregoing provisions of this Section 4.05 is less than one-twentieth of a share of Capital Stock the Company at its option need not make such adjustment at that time.

to exchange debt for equity capital. It would thus seem appropriate for Boeing to be able to issue stock to meet all or part of this liability, with, of course, the shares being valued according to their market value at date of issuance.

24 The section is four printed pages long and therefore will not be reprinted here in its entirety.

Appellants on the other hand contend that the proper conversion rate was at least 2.045 or as high as 2.08.

On November 4, 1958, Boeing declared a 4 per cent stock dividend and issued 281,537 shares therefor. Section 4.05(b)iv states that in the case of shares so issued the consideration therefor shall be "deemed to be the number of shares so issued multiplied by the market value thereof."[25] Boeing initially calculated the market value by including the stock dividend shares in the number of shares outstanding to obtain the market value of the post dividend stock, *i.e.*, by dividing the closing price of the stock on November 4 of $56.875 by 1.04 since there were 104 shares where there had been 100. This resulted in a market value figure rounded off to $54.75 which, multiplied by the number of stock dividend shares issued, gave a total consideration therefor of $15,414,151.[26] On this basis the calculated rate was 1.9927 but since the indenture required that the conversion rate not be below 2.00, note

25 Market value in connection with a limited stock dividend is defined in Section 1.01 as follows:

> For the purposes of this definition market value shall mean the last reported sale price of the Capital Stock of the New York Stock Exchange (or if not listed on the New York Stock Exchange, then on any national securities exchange where listed) on the date of declaration of each stock dividend involved or, if there shall not have been a sale on such date, on the basis of the average of the bid and asked quotations therefor on said exchange on such date, or if the Capital Stock shall not then be listed on any national securities exchange, on the basis of the average of the bid and asked quotations in the over-the-counter market on such date.

26 That consideration and the number of shares issued were to be added to the initial consideration of $351,872,350 and 7,037,447 (valued at $50 per share) shares. Under the basic conversion rate formula the product of $100 and the number of resulting shares is divided by the aggregate consideration. "The resulting quotient, adjusted to the nearest one-hundredth, shall thereafter be the conversion rate (until further adjusted) if it is greater than the basic conversion rate [of 2.00 shares for each $100 debenture]." Sec. 4.05(a). But if the adjusted rate is *less* than 2.00 the basic conversion rate of 2.00 governs.

26 *supra*, the rate remained at 2.00. Appellants agree that the rate should be 2.00 but contend that the consideration for the stock dividend shares should be treated as at $14,076,850, the figure which would result from a flat 2.00 or $50 per share rate (above which stock dividend shares could not be valued under the limitations of Section 4.05(a), note 26 *supra*).

Initially the 2 per cent stock dividend of 147,489 shares on November 2, 1959, was treated by Boeing in the same way as the previous year's dividend. The November 2, 1959, closing price of $30.375 per share was divided by 1.02 to obtain a quotient of $29.77 which, multiplied by the number of shares (147,489), gave additional consideration of $4,390,748 to be added to the aggregate consideration (under Section 4.05(b))[27] after the prior stock dividend.

The gist of appellants' complaint about the conversion rate is that in connection with the acquisition of Vertol Aircraft assets in 1960 for 472,736 shares of Boeing, not only were the Vertol assets overevaluated and evaluated at the wrong time so as to obtain the highest evaluation, but the prior stock dividend adjustments were recomputed to the debenture holders' disadvantage. The argument is that all this was done having the conversion rate precisely in mind and with the purpose of keeping it at 2.044999 or below so as to avoid adjustment. (See Exhibit 28.)

The recomputation of the stock dividend adjustments was as follows. The full share price of $56.875 at the close of the 1958 dividend day was taken, that is, the stock dividend shares were not included in the number of shares outstanding. Thus the consideration received was calculated at $16,012,417 (281,537 x 56.875) rather than

27 Appellants overlook the aggregate aspect of Section 4.05(b).

the $15,414,151 previously used. The same was done in connection with the 1959 2 per cent stock dividend, resulting in increased consideration of $4,479,979 rather than the $4,390,748 previously used. Appellants urge that Boeing thereby "added" consideration received of $1,935,-567 from the 1958 dividend (because appellants would treat that as $14,075,850) and $87,843 from the 1959 dividend, thus leaving at the end of this recomputation a conversion rate of 2.0052 rather than one of 2.0161. But the lower court found, and we agree, that while appellants' computations, or at least Boeing's original ones, better represent the economic realities and more accurately follow general accounting practice, there was discretion in the Board under Section 1.01, note 25 *supra*, not to include the dividend shares in computing the market value.

In connection with the Vertol acquisition, the value placed on it for purposes of determination of the conversion rate was the market value of the Boeing stock on November 13, 1959, at 33⅝, for a total of $15,895,748. Appellants argue that three different valuations would have been more accurate and fairer: the valuation on March 31, 1960, of the Vertol assets as recorded on the Boeing books at $12,435,138.47; that on January 18, 1960, when the contract of acquisition was signed and the Boeing stock worth 30⅝; or that on March 30, 1960, when the contract was closed and the Boeing stock worth 24⅛. Any one of these valuation measures would have increased the conversion ratio to over 2.045. But Section 4.05(b)(2) of the Indenture provided that "in the case of the issuance of shares for consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as determined by the board of directors." The district court's finding was that there was no evidence that Boeing "had any purpose of delib-

erately hurting its debenture holders" and that while it was true that on November 13, 1959, the acquisition was still tentative, the board of directors had a colorable right to fix the fair value of the consideration as of November 13, 1959. That decision was one made, the court below found, in good faith and with the approval of accountants, auditors, investment bankers and counsel. Consequently, the court found that the decision was not subject to attack. *See Morris* v. *Standard Gas & Electric Co.*, 31 Del. Ch. 20, 63 A.2d 577 (1949). We do not believe the trial court's findings clearly erroneous. On those findings the conclusion of law was correct. In short, we affirm so much of the trial court's opinion as relates to the conversion rate.

Judgment affirmed in part; reversed and remanded in part.

Supreme Court, U. S.
FILED
JUN 27 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1327

THE BOEING COMPANY
(formerly The Boeing Airplane Company), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1979
CERTIORARI GRANTED MAY 14, 1979

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 551—September Term, 1977.

(Submitted August 18, 1978 Decided December 21, 1978.)

Docket No. 77-7547

En Banc

WILLIAM R. VAN GEMERT, *et al.*,

Plaintiffs-Appellees,

—v.—

THE BOEING COMPANY
(formerly The Boeing Airplane Company), *et al.*,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,*
FEINBERG, MANSFIELD, MULLIGAN, OAKES,
TIMBERS, GURFEIN, VAN GRAAFEILAND and
MESKILL, *Circuit Judges.*

Appeals from an order entered in the United States District Court for the Southern District of New York, Sylvester J. Ryan, *J.*, awarding counsel fees, expenses and disbursements to be paid from the total amount of a class action judgment. Following a decision by a panel of this

court, 573 F.2d 733 (2d Cir. 1978), the court granted a rehearing *en banc*.

The order of the district court is affirmed.

DAVIS POLK AND WARDWELL, New York, New York, *for Defendants-Appellants.*

KASS, GOODKIND, WECHSLER AND GERSTEIN, New York, New York (Stuart D. Wechsler, William A. Kass, Robert S. Churchill, Samuel K. Rosen, Joseph V. Sternberg, of counsel);

NATHAN, MANNHEIMER, ASCHE, WINER AND FRIEDMAN (Norman Winer), New York, New York;

IRVING STEINMAN, New York, New York,

for Plaintiffs-Appellees.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York (Samuel A. Hirshowitz, First Assistant Attorney General, Warren M. Goidel, Carole L. Weidman, Arthur B. Wolfish, of counsel), for New York State Department of Audit and Control, *amicus curiae.*

GEORGE J. SOLLEDER, JR., Special Master, New York, New York, *amicus curiae.*

KAUFMAN, *Chief Judge*:

Attorneys litigating class actions have been variously described as "economically rational entrepreneurs," champions of aggrieved individuals for whom a conventional lawsuit would not be feasible, and the recipients of a "golden harvest of fees." These diverse perspectives, how-

ever, are united by a common theme of which we are not unaware. The conduct of class action litigation is affected by the principles governing the compensation of the attorneys who bring them.

Today we decide, in a case of first impression, that the fees and costs of counsel may be assessed against the unclaimed portion of a class action judgment. Our conclusion is predicated on considerations of equity and sound policy and is sustained as well by longstanding precedent. To hold otherwise, we believe, would engender serious unfairness to claiming class members and their lawyers, without any corresponding benefit to absentees. Moreover, a contrary result would place enormous pressure on attorneys to settle at all costs, and would deter them from instituting meritorious suits.

I.

In February 1966, the Boeing Company decided to call for redemption its issue of 4½% Converted Subordinated Debentures, due July 1, 1980. Pursuant to the terms of the Indenture Agreement, Boeing published notices of its intention in two national newspapers. Boeing also mailed notices to those investors who had registered their debentures. Holders of $1,544,300 of unregistered debentures, however, did not learn of the call until after the conversion deadline of midnight, March 29, 1966, set by Boeing.

At the stroke of twelve their right to convert $100 in principal of bonds into two shares of common stock expired. The two shares were worth $316.25 that day, but the unwitting bondholders were left only with the small consolation of having the right to redeem for $103.25, a figure fixed in the Indenture.

William Van Gemert and several other nonconverting bondholders brought a class action against Boeing, alleg-

ing that they had received inadequate and unreasonable notice of Boeing's decision. The plaintiffs contended that Boeing was civilly liable under the Securities Exchange Act of 1934,[1] the Securities Act of 1933,[2] the Trust Indenture Act of 1939,[3] and New York law.[4]

After a full trial, Judge Ryan dismissed the complaint, having held that Boeing was required to do no more than fulfill notice requirements stated in the Trust Indenture Agreement. On appeal, we decided that the New York law of contracts imposed an implied duty on Boeing—not satisfied by its newspaper advertisements and "eleventh hour" news release—to provide reasonable notice of its intention to redeem the debentures. Accordingly, we held that Boeing was liable despite its compliance with the notice provisions of the Indenture Agreement and remanded the case to Judge Ryan for a determination of damages. *Van Gemert* v. *Boeing Co.*, 520 F.2d 1373, 1383 (2d Cir. 1975) [*Van Gemert* I].

Judge Ryan then proceeded to calculate damages based on the difference between the redemption price of the debentures and the value, as of March 29, 1966, of the shares of common stock into which they could have been converted. We affirmed this ruling, but held, contrary to Judge Ryan, that the plaintiffs were entitled to prejudgment interest. *Van Gemert* v. *Boeing Co.*, 553 F.2d 812, 813 (2d

1 15 U.S.C. § 78f. The plaintiffs contended that Boeing was liable under the Act for violating the New York Stock Exchange Listing Agreement and Section A10 of the New York Stock Exchange Company Manual, on the theory that the statute requires stock exchanges to adopt such rules.

2 15 U.S.C. § 77a *et seq.*

3 15 U.S.C. § 77aaa *et seq.*

4 This claim was heard pursuant to the pendent jurisdiction of the federal courts. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Cir. 1977) (*Van Gemert* II). Since $1,544,300 in principal amount of unregistered debentures had not been converted, it was a simple task to determine that the class members had suffered damages in the sum of $3,289,359.[5]

In the *Van Gemert* II appeal, the law firm of Kass, Goodkind, Wechsler and Gerstein, a member of the committee of attorneys for the plaintiffs,[6] urged for the first time that members of the class who filed proper proofs of claim should be permitted to receive, on a pro rata basis, the unclaimed portion of the total damage award. Boeing responded in opposition that these funds should be returned to it. Without reaching a conclusion as to the ultimate disposition of unclaimed damages, we rejected the firm's proposal. *Id.* at 815-16. Such a plan, we held, constituted a form of fluid class recovery, involving distribution of the unclaimed portion of the judgment to a "next-best" class in contravention of *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). We stated that the procedure suggested by the Kass firm would result in the expropriation of the claims of the silent class members and accordingly, create a windfall for those who filed claims. The panel also concluded that the proposal could not be justified on the ground that claiming class members would use a portion of the unclaimed funds to defray their legal expenses. This, it was decided, would require Boeing to pay indirectly for the legal expenses of successful litigants.

Upon a second remand to Judge Ryan for entry of judgment, he ordered that plaintiffs' attorneys be awarded

5 According to the report of the Special Master appointed by Judge Ryan, filed with this court as a brief *amicus curiae*, the judgment fund now exceeds $6,500,000, including prejudgment interest.

6 The other members of the committee were Nathan, Mannheimer, Asche, Winer & Friedman, and Irving Steinman.

their fees, expenses and disbursements from the total amount of the judgment. He concluded that it was equitable for all class members—claiming and nonclaiming alike—to bear a pro rata share of the costs of producing the judgment in their favor.[7] Boeing appealed this ruling as contrary to the mandate of *Van Gemert* II, contending that the attorneys should receive compensation only from the claimed portion of the judgment.

A panel of this court, in an opinion written by Judge Van Graafeiland, held that the claims of individual class members could not be treated collectively, as if they belonged to the class as a whole, and that because absent class members had not received the benefit of the attorneys' labors, no charge or assessment may be made against their undistributed shares. *Van Gemert* v. *Boeing Co.*, 573 F.2d 733, 736 (2d Cir. 1978) (*Van Gemert* III).[8]

Because of the significance of the issues in this case for the conduct of class action litigation, we decided to rehear the case *en banc*.[9] We now affirm the judgment of the district court.

---

7 Under Judge Ryan's order, each class member's contribution to the total amount of attorneys' fees must bear the same ratio to all such fees as his own recovery bears to the total class recovery.

8 Judge Oakes dissented in part on the ground that the principles governing the award of attorneys' fees are inapplicable to costs and disbursements. *Van Gemert* III, 573 F.2d at 738.

9 Having briefed the issue at our request, Boeing presents the threshold argument that under the "law of the case doctrine," *Van Gemert* II precludes the recovery of costs and attorneys' fees from the unclaimed portion of the bondholders' judgment. We cannot accept this contention.

Van Gemert II held that class members who filed proofs of claim could not be awarded the unclaimed portion of the judgment on a pro rata basis, even if some of those funds were to be used to pay their lawyers. To allow the money judgment to be distributed in such a fashion would countenance "expropriation" of the shares of absentees, and would enable well-informed claimants to avoid paying any attorneys' fees at all. *Van Gemert* III raises the wholly different question whether the lawyers for the class may be awarded their fees and disbursements from the judgment considered as a common fund. The claiming class members will not receive a "windfall," for no payment of funds to a "next-best" class of persons is contemplated by Judge Ryan's order. Rather, the costs of the litigation will be borne by the entire fund, and each class member will be required to pay his proportionate share of attorneys' fees.

Even if *Van Gemert* II had reached the issue raised on this appeal, the law of the case doctrine would not dictate that we treat its ruling as dispositive. Boeing, citing *Bromley* v. *Crisp*, 561 F.2d 1351, 1363 (10th Cir. 1977) (*en banc*), *cert. denied*, 98 S. Ct. 1458 (1978), and *Lathan* v. *Brinegar*, 506 F.2d 677, 691 (9th Cir. 1974) (*en banc*), argues that it would be prudent for the court sitting *en banc* to consider itself bound by the law of the case established by a panel on an earlier appeal, when that ruling was not reviewed *en banc*.

We believe, however, that such a rule would be far too restrictive and that, sitting *en banc*, we may overrule any panel decision that a majority of the active judges believes was wrongly decided, unless a party would be seriously prejudiced as a result, *First National Bank of Hollywood* v. *American Foam Rubber Corp.*, 530 F.2d 450, 453 n.3 (2d Cir. 1976). The purpose of the "law of the case" doctrine is to prevent the continuous relitigation of issues decided by a panel at an earlier stage of a suit. The doctrine, which is in any event no more than an appeal to the "good sense" of the court, *see, e.g.*, *Zdanok* v. *Glidden Corp.*, 327 F.2d 944, 952-53 (2d Cir. 1964), is properly applied to the district court and to other panels of the Court of Appeals. It cannot immunize panel decisions from review by the court *en banc*. *Accord, In re Central R.R. Co.*, 485 F.2d 208, 210-11 (3d Cir. 1973) (*en banc*). And, given the rarity with which petitions for rehearing *en banc* are granted, the spectre conjured by Boeing of continual "second guessing" of panel decisions is insubstantial indeed.

II.

Any consideration of the propriety of awarding attorneys' fees in the federal courts must begin with *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). In that seminal case, the Supreme Court decided that, absent statutory authorization, the federal courts may not shift the costs of litigation from the winning to the losing party. The *Alyeska* Court noted, however, that there are two exceptions to this rule. First, there is inherent power in the courts to assess attorneys' fees for the "will-

ful disobedience of a court order," or when a party has acted in bad faith, *id.* at 258-59. Second, historically, the federal courts have exercised an equitable power to allow attorneys' fees and costs to be charged against a fund created, increased, or protected by successful[10] litigation. *Id.* at 257-58.

The application for the fees may be made by the plaintiffs themselves, *Trustees* v. *Greenough*, 105 U.S. 527 (1881), on the ground that they have performed a service benefiting others similarly situated. But a plaintiff's attorney may himself present a claim to compensation and reimbursement for expenses from the fund, on the theory that he has provided or preserved a benefit—the fund itself—and that the reasonable value of his services should be borne proportionately by all plaintiffs. *Central R.R. & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885).

The paradigmatic common fund is an express trust, as in *Greenough*. Litigation can also "create" a fund, as when the assets of a debtor are brought within the reach of creditors, *Pettus, supra*. Nevertheless, the common fund doctrine has not been restricted to equitable actions in which the court exercised control over a "res". In *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 454, 468-69 (2d Cir. 1974), we awarded attorneys' fees out of the settlement fund in a private antitrust class action suit. Similarly, since a money judgment is itself an identifiable asset on which the trial court may impose a charge, such judgments have also been accorded common fund treatment, *see, e.g.*,

10 The common fund doctrine may be invoked only by successful litigants, *see Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 275 (1975). It "would be a strange inversion if the [common fund] doctrine enabled losers in adversary contests to charge their counsel fees to winners." Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*," 87 Harv. L. Rev. 1597, 1626-27 (1974).

Union Cent. Life Ins. Co. v. *Hamilton Steel Prods., Inc.*, 493 F.2d 76 (7th Cir. 1974); *see generally*, Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 920 (1975); Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 Harv. L. Rev. 1597, 1620-24 (1974).

In *Alyeska Pipeline Service Co., supra*, 421 U.S. at 265 n.39, the Supreme Court established criteria for determining whether benefits derived from litigation could properly be treated as a common fund. The Court stated that the common fund rationale was ill-suited to public interest litigation involving nebulous benefits accruing to a vast class of people. Accordingly, a common benefit did not accrue from litigation over the environmental impact of the trans-Alaska pipeline. The Court declared:

> In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting. In this case, however, sophisticated economic analysis could be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs. *Id.*

We believe that the judgment against Boeing constitutes a common fund within the meaning of *Alyeska*.[11] The class

11 The common fund doctrine also presupposes that the court has "the authority to adjudicate the rights and duties" of those with an interest in the fund, Dawson, *supra*, note 10 at 1618. Although the beneficiaries need not sue as a class to meet this criterion, *United States* v. *ASCAP*, 466 F.2d 917, 919 (2d Cir. 1972), a class action presents the clearest case for the exercise of such judicial authority. The plaintiffs in the suit before us were certified as a 23 (b) (1) class

of debenture holders here is comparable in size to that of the creditors in *Pettus* and the bondholders in *Greenough*. Moreover, the *Van Gemert* class is smaller than the class of 85,000 union members in *Hall* v. *Cole*, 412 U.S. 1 (1973) and the 8,987 shareholders in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)—two cases cited with approval in *Alyeska*.[12] Nor is the class membership here difficult to identify for the purposes of tracing the benefits accurately. Unlike the sprawling throng of potential beneficiaries in *Alyeska*—all those who would derive benefits from a pristine Alaskan wilderness—the beneficiaries of this action form a well-defined class, limited to those who failed to convert unregistered bonds of a specific issue of Boeing debentures. The names of the individual bondholders are not, to be sure, always ascertainable. But since each unconverted debenture is readily identifiable—and in fact bears an explicit number—it is quite evident that the damages owed to each plaintiff can be traced to each debenture with perfect accuracy. Elementary arithmetic, not "sophisticated economic analysis", is all that is required to determine the distribution of benefits. To calculate the amount of the judgment, it was necessary only to subtract the redemption price of each debenture from the value of the two shares of common stock to which it could have been converted. And it is equally simple to prorate the

under the Federal Rules. No class member could have opted out of such a suit even if he had desired to do so; once the class was certified, no other forum could have adjudicated their rights with respect to the fund.

12 In *Brennan* v. *United Steelworkers of America*, 553 F.2d 586 (3d Cir. 1977), the court ruled that a common benefit could accrue to a class of 1,400,000 union members, noting that the plaintiff class need not be small in "absolute numbers." *Id.* at 606. *See also, Yablonski* v. *United Mine Workers of America*, 466 F.2d 424 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973) (class of 162,000 union members).

cost of the suit with complete exactitude so that each debenture holder's recovery is taxed with the cost of vindicating his interest.[13] Indeed, the "identification" and "tracing" criteria are met more completely in the case before us than in either *Hall* or *Mills*, neither of which involved tangible economic benefits at all.

III.

The panel in *Van Gemert* III held that the common fund doctrine requires that expenses be assessed only against those who have actually claimed the fruits of the litigation, because no one else has benefited from the suit. We believe this construction of the concept of a "benefit" is too narrow and is not supported by the common fund case law. In *Greenough*, the Court noted that not every bondholder had filed claims against the fund, but nevertheless charged the entire fund with costs and fees. 105 U.S. at 529, 531. In *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), the plaintiff sued individually to establish her right, as a beneficiary of a trust consisting of bonds held by a bank, to a lien on the proceeds from the sale of the bonds. In the process, she established the right of thirteen other beneficiaries to recover a share of the trust's assets. The Court, in an opinion by Justice Frankfurter, allowed the plaintiff to recover her attorney's fees out of those assets, although it was by no means clear that the other *cestuis que trust* would bring suit. If a plaintiff class-member is adjudicated to have an interest in a fund, he has benefited within the meaning of the common fund doctrine.[14]

13 *See* note 7 *supra*.

14 Citing the venerable Williston, our Brother Van Graafeiland maintains that the common fund doctrine is inapplicable unless the benefit conferred is knowingly accepted. Any requirement that the absentees

The rationale for such a rule is evident, as the case before us indicates. A portion of the judgment won by plaintiffs' attorneys—at least $213 for each unconverted debenture—is due every member of the class. Each plaintiff has a present vested interest in the class recovery, and his share of the judgment may be received on request. It cannot be urged convincingly, then, that the absent plaintiffs have not received a benefit from the litigation.

Our conclusion that the district court properly charged attorneys' fees against the shares of nonclaiming class members is far from heretical. At common law, an attorney's lien attached to a judgment obtained for his client, as security for his fees and expenditures. *See* Restatement (2d) Agency § 464(c). Under this doctrine, which is as

actually file claims, however, is foreclosed by *Sprague* and *Greenough*. Moreover, as *Haynes* v. *Koderi A/S Aladdin*, 362 F.2d 345, 351 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967) noted, it is sufficient if the attorneys' services and the benefits accruing from it are "impliedly" accepted. Manifestly, plaintiffs in a 23(b)(3) class action, who have been provided with notice and an opportunity to opt out of the suit, must be said to have accepted the attorneys' services, and the benefits that may flow from them.

Of course, class actions certified under Rule 23(b)(2) or, as in this case, 23(b)(1), do not contain an opt-out privilege. This reflects the conclusion of those who drafted the Rules that individual choice should be subordinated to the interests of the class as a whole to avoid inconsistent judgments or prejudice to absent class members. Because class certification represents a judicial determination that the absentees are adequately represented, it would frustrate the Rule if we were to require an investigation into each plaintiff's willingness to accept the benefits of the litigation.

Our conclusion rests on firm foundations, for absentees are in no way harmed by our decision. It simply does not accord with fact to argue, as the minority seems to, that because a deduction from the shares of unnamed plaintiffs has been made for attorneys' fees, they are being held liable for *more* than they have gained. If, as we hold, they have benefited from the judgment, it is appropriate to charge them their *pro rata* share. And if, as the dissent contends, they have gained nothing by the victory against Boeing, then it is difficult to understand how a deduction from the spoils of that victory can be said to have injured them. The dissenters cannot have it both ways.

American as the "American Rule" against charging the losing party with the fees of his adversary, the attorney is *himself* entitled to have the judgment enforced and compensation paid, *id.* and comment n.; *Falcone* v. *Hall*, 235 F.2d 860 (D.C. Cir. 1956). Indeed, in *Pettus*, Justice Harlan noted that under state law the lien of plaintiffs' attorney could not be defeated by the successful purchase of the plaintiffs' claims. 113 U.S. at 127-28. Thus, since the attorney's right to his fee arose out of his creation of the judgment and not his client's receipt of the proceeds, our interpretation of the common fund doctrine is in harmony with time-honored principles of the common law.[15]

In contrast to the "expropriation" feared in *Van Gemert* II, deducting fees from each plaintiff's share in the judg-

15 The argument that there is no attorney-client relationship between the absentees and class counsel is not persuasive. A certification under Rule 23(c) makes the *class* the attorney's client for all practical purposes, *Developments in the Law: Class Actions*, 89 Harv. L. Rev. 1318, 1592-97 (1976). The judgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented. Without question, it is settled that the attorney is not free to advocate the interests of the named plaintiffs alone. *See Gonzales* v. *Cassidy*, 474 F.2d 67, 75-76 (5th Cir. 1973). And absentees do not cease to be clients simply because they fail to claim their portion of the class recovery.

It begs the question to argue that since absentees are not parties for all purposes, they cannot be parties when the objective is to award attorneys' fees. The absentees are certainly parties in the most fundamental sense, for, as we have already indicated, they are bound by the judgment. Whether a given procedural rule should be applied to those who are not named plaintiffs depends on the function of the rule. Absentees are not considered parties against whom counterclaims under Fed. R. Civ. P. 13 may be asserted, because "the right to counterclaim is readily subject to abuse as a tactical device to encourage plaintiffs to opt out." *See, e.g., Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973). There can be no comparable objection to treating unnamed plaintiffs as parties for the purpose of assessing attorneys' fees, for no affirmative burden is placed on them by our ruling today. Indeed, it is only when the case is resolved in their favor, because of their counsel's efforts, that fees are assessed.

ment will not benefit some plaintiffs at the expense of others.[16] Each plaintiff will receive only his pro rata share of the recovery, less attorneys' fees, independent of the size of the unclaimed portion of the fund.[17] This is not a "fluid recovery" case.

We believe, moreover, that a ruling for Boeing would be unfair to both the claiming plaintiffs and the class attorneys, and would deter lawyers from bringing meritorious lawsuits. In setting attorneys' fees in class action litigation, courts must multiply the number of hours spent on the litigation by an appropriate hourly rate, and then adjust the fee to take into account the difficulty of the case, the attorney's risk in undertaking it, and the quality of representation.[18]

If victorious attorneys were permitted to charge fees only against claiming class members, the standards evolved by the courts to ensure rationality and fairness in fee setting would go for nought, because the compensation the attor-

16 We therefore do not find apposite to our holding today the concern expressed in *Van Gemert* II that claimants may be encouraged to keep absent class members uninformed about the judgment in their favor. In any event, the district judge will invariably require that adequate notice of the judgment be provided. In the instant case, Judge Ryan appointed a special master for this purpose, who sent notices to each individual whose name could be ascertained, and to all brokerage firms, banks, and other financial institutions, with instructions to transmit the notice to interested clients. Notice was also published once a week for three consecutive weeks in the *Wall Street Journal* and the *New York Times*.

Any alleged conflict of interest between the attorneys and the unnamed plaintiffs is vitiated here, as in every class action, by judicial supervision of the fee award.

17 We intimate no view as to the appropriate ultimate disposition of the remainder of the fund.

18 *See, e.g., City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Lindy Brothers Builders, Inc.* v. *American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973).

ney received would be dependent on a purely fortuitous event. It would not suffice to adopt a rule that the attorney's fee should be set at a fixed sum, calculated by considering the factors described above, but chargeable only against the recovery of those who claimed their shares. In suits in which a relatively small number of claimants come forward, the attorney's fee would leave those claimants with no recovery at all—if, in fact, sufficient funds were claimed to pay the entire fee. In the instant case, each debenture holder had an economically significant interest in the litigation—and yet deducting attorneys' fees only from the claimed portion of the judgment may leave each plaintiff bereft of benefits.[19] Such a rule would indeed make this a "lawyer's lawsuit," *Van Gemert* III, *supra*, 573 F.2d at 735.

On the other hand, if we were to protect the plaintiffs by limiting the attorney to a fixed percentage of the judgment actually claimed, the resulting fee would be entirely dependent on the number of plaintiffs who came forward. Considerations of the difficulty of the case, the quality of representation, and the hours spent by the attorney, would not determine the ultimate size of the fee. Nor can the attorney always determine whether it would be worthwhile for him to undertake the risks of litigation, for the number of plaintiffs who will come forward after judgment is often unpredictable. Of course, the risk that only a fraction of plaintiffs will claim is greatest if the individual claims are small.[20] The percentage of class members who file claims,

19 Judge Ryan has not yet fixed the attorneys' fees in this case.

20 The drafters of Rule 23 (b) (3) contemplated that class actions would be utilized to enable those with individually non-viable claims to vindicate their interests. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I*,

however, is not a function solely of the value of each plaintiff's stake in the litigation. In this very case, although the judgment gives each class member the right to twice his original investment in damages, only 20% of the judgment has been claimed after months of diligent efforts to locate absentees. The Special Master appointed by Judge Ryan attributed the low response to "both the passage of 12 years and the fact that the debentures were unregistered."[21] If the number of claiming plaintiffs were to become the dominant—indeed determinative—factor in setting appropriate attorneys' fees, lawyers would be discouraged from bringing class suits, regardless the merits of the case.

Refusing to charge fees against the entire judgment fund would also put a high premium on settling cases. When a class action is settled, the attorney's fee conventionally comes "off the top". *See, e.g., Blank* v. *Talley Industries*, 390 F. Supp. 1, 3 (S.D.N.Y. 1975) (Weinfeld, J.). The attorney is assured of the full amount of the fee that the court has found to be reasonable, regardless of whether some of his clients have failed to claim.[22] To be sure, in determining fair compensation the judge may take into account the number of plaintiffs likely to claim, *id.*, but the claimed portion of the fund does not place a ceiling on the fee. *See, e.g., Voege* v. *Ackerman*, 70 F.R.D. 693 (S.D.N.Y. 1976) (Weinfeld, J.). If an attorney's fee in a class action that goes to final judgment were so restricted, lawyers would be tempted to consider settling their clients'

81 Harv. L. Rev. 356, 397-98 (1967). The rule propounded by the dissenters would have a devastating effect on (b) (3) class suits.

21 Report of the Special Master, *supra* note 5, at 4.

22 Interim fees are often awarded after a settlement has been approved but before the parties have arrived at a plan of distribution to sub-classes—and, of course, before individual claims have been filed. *See* 3 H. Newberg, *Class Actions* § 6975 at 1263-66 & n.10 (1977).

claims for less than adequate sums. Fee awards should not be so structured as to encourage such conduct."[23]

Finally, our holding is perfectly consistent with the "American rule". The rationale of that doctrine is that litigants should not be deterred from pursuing *bona fide* claims or defenses by fear that they will be burdened by the costs and attorneys' fees of their successful adversary. *See Fleischman Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967). Under today's decision, however, the fees of the attorneys for the class will be deducted from the amount for which Boeing has *already* been held liable. There is no "surcharge" on the defeated litigant.

Affirmed.

VAN GRAAFEILAND, J., dissenting
(with whom Judges MULLIGAN and TIMBERS concur):

With all respect to our colleagues in the majority, we believe they have allowed their enthusiasm for class litigation to lead them into approving an award to attorneys that cannot be justified under either contract or quasi-contract principles of law. In our view, there is no attorney-client relationship between the named plaintiffs' attorneys and the non-claiming absentee debenture holders upon which to base a claim reading in contract. Nor have the non-claiming absentees been unjustly enriched, so as to give the lawyers a quasi-contractual right of recovery based on quantum meruit. In short, we see nothing in this case that justifies an award of substantial fees to lawyers for work purportedly performed on behalf of persons who are not their clients and who, themselves, have not received a single penny as a result of the lawyers' efforts.

23 *See generally* Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. Legal Studies 47, 56-60 (1975).

Little purpose would be served by simply repeating in this dissent what has already been said in prior opinions and is now being rejected by this en banc court. However, some repetition of both the law and the facts is necessary as a framework for the discussion that follows.

When Boeing, on July 15, 1958, offered its shareholders the right to subscribe to its debentures, the subscription rights were evidenced by warrants issued in the shareholders' names. Each warrant was fully negotiable, however, and could be transferred by delivery in blank. The transferee was entitled to use the warrant for subscription without having a new warrant issued. Approximately 7,000,000 rights were issued; and, between July 15, 1958, and July 29, 1958, the date the subscription offer expired, approximately 1,700,000 of them were traded on the New York Stock Exchange. During this same period, subscriptions having a total value of $29,578,500 were received by Boeing's transfer agent.

Between August 4, 1958, when the debentures were admitted to trading on the New York Stock Exchange, and March 29, 1966, when trading terminated, over $69 million in debentures were traded. Because the debentures, like the warrants, were in bearer form and negotiable upon delivery, there was no way of knowing in 1966 how many of them were still held by the original subscribers. Semi-annual interest on the debentures was collected by detaching a coupon and forwarding it to the Chase Manhattan Bank, the indenture trustee. A vast majority of the interest coupons were tendered to Chase by collecting banks on behalf of unidentified debenture holders. In those instances where coupons were tendered directly by debenture holders, Chase made a list of the tenderers which it retained for approximately six months.

As of March 8, 1966, there were approximately 27,000 debentures outstanding in the aggregate principal amount of $21,514,900. As of March 29, 1966, conversion rights had not been exercised for debentures in the face amount of $1,544,300.

During the next several months, ten separate actions were commenced against Boeing on behalf of non-converting debenture holders. The Van Gemert action was commenced on June 23, 1966. On July 21, 1966, upon the application of Boeing's attorneys, the district judge signed an order directing all present and former holders of unconverted debentures to show cause before him on September 6, 1966, why an order should not be entered determining that the action be maintained as a class action on their behalf, why they should not be permitted to appear and intervene in the action and present claims, if any, and why they should not be included in the class and bound by the final judgment. The court directed that Boeing give notice to the present and former debenture holders by mailing a court-approved form to those "whose addresses may be known to the defendants" and by publishing the notice twice a week for two successive weeks in the national editions of the New York Times and the Wall Street Journal. Because there was no way Boeing could identify each holder of the bearer debentures as of March 29, 1966, it compiled a list of persons who it believed might at some time have had an interest in the unconverted debentures and addressed notices to all of them.

No one knows, of course, whether each putative class member received a copy of the notice. No one knows how many of them may have been dead or incompetent when the notice was sent. Indeed, to this date, no one can accurately identify all of the class members. Those persons who did receive notice found no reference therein to any

legal representation for the class. No attorneys except Boeing's were named or described. Nothing was said about attorneys' fees or disbursements. No mention was made of a "fund" from which the attorneys would be paid.

These absentee debenture holders did not become clients of the attorneys for the named plaintiffs, nor of those attorneys who were subsequently appointed by the district court to serve as the "representative committee" of plaintiffs' attorneys. 3 H. Newberg, *Class Actions* ¶ 6824C at 1147 (1977). Indeed, for most purposes, the absentees could not even be considered parties to the law suit. *See In re Four Seasons Securities Laws Litigation*, 525 F.2d 500, 504 (10th Cir. 1975); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 348-49 (E.D. Pa. 1976); *Lamb* v. *United Security Life Co.*, 59 F.R.D. 44, 48-49 (D.C. Iowa 1973); *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973); 2 H. Newberg, *Class Actions, supra*, § 2780 at 1249-50 Accordingly, we fail to see the significance of the majority's discussion of attorneys' liens, "clients" who have failed to claim, and "parties" who must bear their own attorneys' fees.

We do see significance, however, in the fact that attorneys who profess to be representing the interests of absentee class members have no hesitancy in leaving them without representation when the matter of attorneys' fees is at issue. *Cf. Cherner* v. *Transitron Electronic Corp.*, 221 F.Supp. 55, 61 (D. Mass. 1963). We believe that once an attorney undertakes to represent class interests, it makes no difference by whom he was retained; he owes to all class members a duty of equal and fair representation. *Berner* v. *Equitable Office Bldg. Corp.*, 175 F.2d 218, 220 (2d Cir. 1949). A conflict of interest that prevents full and fair representation not only violates Rule 23 but also raises a serious question of lack of due process. *See Carroll* v. *American Federation of Musicians*, 372 F.2d 155,

162 (2d Cir. 1967), *vacated and remanded on other grounds*, 391 U.S. 99 (1968); *Phillips* v. *Klassen*, 502 F.2d 362, 366 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). If the absentee class members who have received nothing from the escrow fund were to discover that a group of unknown lawyers had received substantial awards from the absentees' undistributed shares, it is hard to believe that the absentees would not strenuously object to what must appear to them to be a lawyer's windfall. This is a viewpoint that should be expounded by the lawyers who claim to be the absentees' representatives. Instead, the lawyers advocate only their own cause and, as an incident thereto, the cause of their clients. This is a strange position indeed for lawyers who are seeking equitable relief from the courts. *Cf. National Association of Regional Medical Programs, Inc.* v. *Matthews*, 551 F.2d 340, 344-46 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

In *Van Gemert III*, 573 F.2d 733, we held that an award of fees under the equitable fund doctrine must be based on a theory of quantum meruit and that class attorneys should not be compensated for potential benefits not accepted by absent members of the class. Although we had no way of knowing at that time how much of the escrow fund would remain unclaimed, we stated that "the history of class litigation to date has demonstrated a surprisingly small response by absent members notified of their right to make claims." *Id.* at 736 n.4. This is one of the few statements in the opinion that has withstood the careful scrutiny of our learned colleagues. As Chief Judge Kaufman points out, claims representing only twenty percent of the escrow account have been filed, and the filing deadline was September 1, 1978.[1] Taking into account that the named plaintiffs

1 The notice of availability of proofs of claim stated that any debenture holder who did not file by the deadline date would be precluded from participating in the award of damages.

in the ten original lawsuits owned over ten percent of the unconverted debentures for which damages are being sought, the response by absentee holders is indeed small. At the present juncture, it appears that eighty percent of the fees and disbursements of the lawyers for the named plaintiffs will be paid from funds earmarked for absent class members who will not receive a penny.[2] We in the dissent do not believe that such a bizarre state of affairs can be justified simply by pointing to a "common fund" as the source of the lawyers' fees.

The "equitable" or "common" fund doctrine was created for the purpose of preventing unjust enrichment. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970); *Fleischman Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 719 (1967); *Grace* v. *Ludwig*, 484 F.2d 1262, 1269 (2d Cir. 1973), *cert. denied*, 416 U.S. 905. There can be no unjust enrichment unless a benefit has been conferred and knowingly accepted. *Woodruff* v. *New State Ice Co.*, 197 F.2d 36, 38 (10th Cir. 1952); *In re Irving-Austin Bldg. Corp.*, 100 F.2d 574, 578 (7th Cir. 1938). *Williston on Contracts* puts it this way:

> Three elements must be established in order that a plaintiff may establish a claim based on unjust enrichment. These elements are:
>
> 1. A benefit conferred upon the defendant by the plaintiff;
>
> 2. An appreciation or knowledge by the defendant of the benefit; and

[2] It is possible that the September 1st deadline may be extended by the district court and that additional filings may reduce somewhat the eighty percent figure. However, the principle that one should not be required to pay for something he has neither requested nor received remains the same, whether the figure is eighty percent or one percent.

> 3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

12 *Williston on Contracts* § 1479 at 276 (3d ed. 1970).

This rule requiring a knowing acceptance of benefits applies to a fund created through the efforts of an attorney. *See Haynes* v. *Rederi A/S Aladdin*, 361 F.2d 345, 351 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967); *Lea* v. *Paterson Sav. Inst.*, 142 F.2d 932, 934 (5th Cir. 1944). Newberg describes its application to class recovery funds as follows:

> Absent class members have no obligation to pay attorneys' fees and litigation costs, except when they elect to accept the benefit of the litigation. Absent class members who accept any part of any recovery fund are liable for their proportional share of fees and costs. The attorney who creates a fund is entitled to a fee from each class member who accepts the benefits of the fund.

2 H. Newberg, *Class Actions, supra*, § 2780 at 1249.

Another established rule of quasi-contract law is that an innocent recipient of benefits cannot be held liable to any greater extent than the amount by which he has been enriched. *Hill* v. *Waxberg*, 237 F.2d 936, 939 (9th Cir. 1956); *In re Irving-Austin Bldg. Corp., supra*, 100 F.2d at 578; *Dunn* v. *Phoenix Village, Inc.*, 213 F. Supp. 936, 952-53 (W.D. Ark. 1963); *Restatement of Restitution* § 1 comment e, § 155; Beale, *The Measure of Recovery Upon Implied and Quasi Contracts*, 19 Yale L.J. 609, 620-21 (1910).

No matter which of the foregoing rules is applied to the facts of this case, the order appealed from is wrong.

The Special Master's notice to debenture holders made it clear that receipt of the notice did not mean that the recipient would ultimately be found entitled to participate in the award of damages. The burden was placed upon the recipient to establish his right of recovery and to submit executed proofs of claim and supporting documents by September 1, 1978. If the non-claiming absentees were not precluded after September 1, 1978, from participating in the fund, the day will surely come when they will be. We are convinced that these individuals, thus precluded from sharing in the "common fund", cannot be said to have accepted the benefits of the lawyers' efforts. Any charge levied against them for attorneys' fees is clearly in excess of benefits received.

When the panel in *Van Gemert I*, 520 F.2d 1373, found Boeing's notice of redemption to be inadequate, it directed that damages be awarded to the seven percent of debenture holders who did not convert, without considering whether their failure to convert might have resulted from some cause other than lack of notice. All the non-converters had to do in order to collect was to file a claim. The Court now holds that, insofar as the attorneys' right of recovery is concerned, it isn't even necessary that a claim be filed by the debenture holders. Our brothers will not allow the absentees' failure to file, whether caused by death, incompetency, incapacity, lack of knowledge, or unwillingness, to prevent the lawyers from taking their cut of the unclaimed moneys.[3]

3 Perhaps, as the majority opinion intimates, we in the dissent are too much influenced by "venerable" works such as Williston on Contracts. Whatever the reason, we are unable to visualize a situation in which a non-converting debenture holder who died before the action was commenced can become a client of the "class" attorneys or can "impliedly" accept the benefits of the attorneys' efforts.

(footnote continued on next page)

This means that attorneys may sue on behalf of unknown and unnamed individuals, secure a money judgment, ostensibly on their behalf, and pocket a substantial part of the judgment funds earmarked for non-claiming absentees, without these absentees even knowing what has happened. Apparently, our colleagues in the majority either believe this is not occurring in the instant case or else deem its occurrence to be of no consequence.[4] We disagree on both counts. If lawyers must receive this sort of favored treatment to encourage the bringing of class actions, perhaps the game is not worth the candle; the public is giving up more than it is receiving in return.

We continue to believe that *Van Gemert III* was rightly decided, and we adhere to the views expressed therein.

We likewise cannot comprehend how the holder of a $100 debenture, who for any of a number of reasons does not collect, can be said to benefit to the same extent as the holder of a $100 debenture who does collect so that their "pro-rata" shares of attorneys' fees are the same.

4 The majority's attitude appears to be summed up in footnote 14 of the majority opinion where they say that deducting attorneys' fees from the "spoils" of the litigation cannot injure absentee class members who are not going to collect anyway.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 551—September Term, 1977.

(Argued December 12, 1977 Decided March 27, 1978.)

Docket No. 77-7547

WILLIAM R. VAN GEMERT, et al.,

Plaintiffs-Appellees,

v.

THE BOEING COMPANY
(Formerly the Boeing Airplane Company) et al.,

Defendants-Appellants.

Before:

MULLIGAN, OAKES and VAN GRAAFEILAND,
Circuit Judges.

Appeal from a final order of Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York which directed that plaintiffs' attorneys' fees be paid from the entire class fund rather than from that portion which is claimed by class members.

Reversed and remanded with instructions.

S. HAZARD GILLESPIE, New York, N.Y. (Davis Polk & Wardwell of counsel), *for Appellants. The Boeing Company (Formerly The Boeing Airplane Company), et al.*

STUART D. WECHSLER, New York, N.Y. (Kass, Goodkind, Wechsler & Gerstein of counsel), *for Appellees, William R. Van Gemert, et al.*

IRVING STEINMAN, New York, N.Y. (Samuel Weinstein of counsel), *for Appellees, William R. Van Gemert, et al.*

NORMAN WINER, New York, N.Y. (Nathan, Mannheimer, Asche, Winer & Friedman, of counsel), *for Appellees, William R. Van Gemert, et al.*

VAN GRAAFEILAND, *Circuit Judge:*

In 1975, this Court ruled that appellant Boeing did not give adequate notice of its intention to call certain convertible debentures and held it liable in this class action brought on behalf of debenture holders who failed to convert. *Van Gemert* v. *Boeing Company*, 520 F.2d 1373 (2d Cir.), *cert, denied*, 423 U.S. 947 (1975). Subsequent proceedings in district court resulted in an order directing the deposit of the amount of the judgment award, approximately six million dollars, in an escrow account in a New York City bank. A Special Master was appointed, with authority to receive and pass upon proofs of claim and to supervise the administration of the judgment.

The order provided further that the members of plaintiffs' committee of attorneys be awarded their fees, expenses and disbursements, as fixed by the court, payment thereof to be made from the total amount of the judgment.[1] The sole issue on this appeal is whether that portion of the escrow fund which is not claimed hereafter by class members can be charged with a pro rata share of the attorneys'

1 The district court ordered that affidavits in support of counsels' application for fees be submitted within twenty days of the entry of judgment.

fees and expenses. We hold that until absent class members receive the benefit of the attorneys' labors by claiming their portions of the award, no such charge or assessment may be paid from their undistributed shares.

The question of unclaimed funds has been before this Court on a prior appeal which followed our original decision on liability. *Van Gemert* v. *Boeing Co.*, 553 F.2d 812 (2d Cir. 1977). On that appeal, we rejected a request that the shares of non-claiming class members be distributed pro rata among claiming members in order to assist them in paying their legal fees and disbursements. Citing *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974), we held that the "extraordinary remedy" of fluid class recovery was not justified under the circumstances of this case.[2] *Van Gemert*, 553 F.2d at 815-16. Appellees now seek to avoid the effect of our prior holding by requesting only a portion of the unclaimed funds, with payment thereof to be made directly to their attorneys.

In so doing, they rely upon the equitable or common fund doctrine fathered by the leading cases of *Trustees* v. *Greenough*, 105 U.S. 527 (1881), and *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885). Under this doctrine, an attorney who creates or preserves a fund for the benefit of others in addition to his client may be awarded compensation from those who accept the fruits of his labors. *Pettus*, 113 U.S. at 125, 127. This award is not based upon the existence of an attorney's lien against the fund, but rather upon the equitable principle that those who benefit from the attorney's services should pay for them.

2 Because the Supreme Court vacated and remanded *Eisen* on other grounds, it did not pass upon the issue of fluid class recovery. However, the Ninth Circuit appears to share this Circuit's unwillingness to treat the class as a whole as a judicial entity for purposes of suit. *See In re Hotel Telephone Charges*, 500 F.2d 86, 89-90 (9th Cir. 1974).

General Finance Corp. v. *New York State Rys.*, 3 F. Supp. 975, 976 (W.D.N.Y. 1933) (quoting *In re Gillaspie*, 190 F. 88, 91 (N.D. W. Va. 1911)). More recent decisions, expanding on the concept of unjust enrichment, have held that under appropriate circumstances an attorney may have a right to compensation from the beneficiaries of his labors even though his efforts have not been directed toward the creation or preservation of a fund. *See, e.g., Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-97 (1970); *Sprague* v. *Ticonic Bank*, 307 U.S. 161 (1939); *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005, 1008 (2d Cir. 1975).

Appellees contend that the foregoing line of authorities justifies an award for attorneys' fees from the six-million dollar class award regardless of whether the entire award is distributed to class members. This argument has a surface appeal because it suggests a procedure that not only appears to be reasonable, but also is simple to apply. There are, however, other factors which must be considered in weighing the merits of appellees' proposal.

Class actions, termed by some as "lawyer's lawsuits", *see Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1605 (1976), have received a good deal of criticism; and much of this has been directed at the substantial fees awarded to class attorneys. *See, e.g., Alpine Pharmacy, Inc.* v. *Chas. Pfizer & Co.*, 481 F.2d 1045, 1049-50 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973). Terms such as "golden harvest of fees", *Free World Foreign Cars, Inc.* v. *Alfa Romeo, S.p.A.*, 55 F.R.D. 26, 30 (S.D.N.Y. 1972), "astronomical fees", M. Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365, 366 (1972), and "enormous fees", Comment, 54 U. Det. J. Urb. L. 598, 611 (1977), are used to describe the allowances, which often run into the million of dollars.[3] Critics point

3 Counsel in this case are requesting fees of approximately two million dollars.

particularly to over-generous applications of the equitable fund doctrine, by means of which massive fees are awarded attorneys with too little regard for the interests of the class members. *See City of Detroit* v. *Grinnell Corp.*, 560 F.2d 1093, 1098 (2d Cir. 1977). This criticism, much of which is justified, prompts careful inquiry into whether it would be a misapplication of the equitable fund doctrine to permit counsel herein to collect part of their fees and expenses from the allocable shares of class members who claim none of the proceeds of the recovery.

Although the amendments to Rule 23 have been in effect since 1966, only a few class actions for damages have gone through a trial on the merits to judgment. *Eisen*, 479 F.2d at 1018-19; C. Wolfram, *The Antibiotics Class Actions*, 1976 Am. B. Foundation Research J., 251, 357; W. Simon, *Class Actions—Useful Tool or Engine of Destruction?*, 55 F.R.D. 375, 378 (1972); Note, *The Cy Pres Solution to the Damage Distribution Problems of Mass Class Actions*, 9 Ga. L. Rev. 893, 900 (1975). As a result, there has been little need to resolve the "troublesome question" of what to do with the unclaimed portion of a judgment for damages in favor of a class. *See Eisen*, 479 F.2d at 1012.[4] Fluid class recovery concepts have been adopted by a number of courts in actions which have terminated in settlement. *See, e.g., State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).[5] However,

4 Although we do not know that there will be any unclaimed funds, the history of class litigation to date has demonstrated a surprisingly small response by absent members notified of their right to make claims. *See* F. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 206 (1976); W. Simon, *Class Actions—Useful Tool or Engine of Destruction?*, 55 F.R.D. 375, 377-78 (1972).

5 *But see B & B Investment Club* v. *Kleinert's Inc.*, 62 F.R.D. 140, 150 (E.D. Pa. 1974) where the Court said: "We do not perceive any reason

precedents involving settlements are of little help when a case has been litigated through trial to judgment. *Eisen*, 479 F.2d at 1012; *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45, 71 (D.N.J. 1971).

This Court expressed in *Eisen*, *supra*, its unwillingness to adopt the concept of fluid class recovery, and, on a prior appeal, we refused to apply it in this litigation, which is fundamentally a private dispute arising out of the debenture contract. *Van Gemert*, 553 F.2d at 815, 816. In *Eisen* we said that "the claims of many may not be treated collectively or as 'the class as a whole' . . . ." 479 F.2d at 1014. The compensation of appellees' attorneys must come therefore from the individual class members, not from the "class as a whole."

Although the holdings which follow *Greenough* and *Pettus* speak broadly of recovering attorneys' fees from funds, intrinsic in every case is the requirement that benefits must accrue to those against whom expenses are assessed. *See Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, n.39 (1975). "The award of fees under the equitable fund doctrine is analogous to an action in quantum meruit: the individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the service performed." *Lindy Bros. Builders* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir. 1973).[6] Those who receive no benefit from the lawyer's work should not be required to pay for it. *Schechtman* v. *Wolfson*, 244 F.2d 537, 540 (2d

why maximum exposure could not be provided for with provisions made, depending upon the claims presented, for a return of any excess to the defendants."

6 In *City of Detroit* v. *Grinnell Corporation*, 495 F.2d 448, 470 (2d 1974), this Court, quoting *Lindy*, said: "In its simplest terms, the purpose of the fee award is to 'compensate the attorney for the reasonable value of services benefiting the . . . claimant.'"

Cir. 1957); *Nolte* v. *Hudson Nav. Co.*, 47 F.2d 166, 168 (2d Cir. 1931); *Simmons* v. *Friday*, 190 F.2d 849, 852 (8th Cir. 1951); *In re Irving-Austin Bldg. Corp.*, 100 F.2d 574, 578 (7th Cir. 1938); *Baltic Independent School District* v. *South Dakota High School Activities Association*, 362 F. Supp. 780, 786 (D. S. Dak. 1973); *cf. City of Miami Beach* v. *Jacobs*, 341 So. 2d 236 (Fla. Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 945 (Fla.), *cert. denied*, 98 S.Ct. 430 (1977). In a private action for damages such as this, "[t]here is no reason why the attorneys should be compensated for potential benefits not accepted by members of the class." *Blank* v. *Talley Industries, Inc.*, 390 F. Supp. 1, 6 (S.D.N.Y. 1975); *see also* 2 H. Newburg, *Class Actions*, ¶2780 at 1249 (1977); E. Labowitz, *Class Actions in the Federal System and in California: Shattering the Impossible Dream*, 23 Buf. L. Rev. 601, 647 (1974); *cf. Miller* v. *Union Barge Line Corporation*, 299 F. Supp. 718, 721 (W.D. Pa. 1969).

The application of this rule should cause no administrative difficulties on remand. Having directed the creation of an escrow account for the total amount of the possible recovery, the district court must now set a reasonable period of time for the proof of claims by class members. Because both administrative expenses and attorneys' fees and disbursements are to be charged pro rata against the awards to class members, payment of the awards must be deferred until the Special Master has completed processing the claims and his fees and expenses can be determined. At that point, the benefits accruing to class members can be "traced with some accuracy", and the costs can be "shifted with some exactitude to those benefiting." *Alyeska*, 421 U.S. at 265 n.39. The district court may then make an appropriate award for attorneys' fees and expenses.

If any funds remain unclaimed, the Court must make appropriate disposition of them. Because it is conjectural

as to whether there will be any unclaimed funds and because we have not been asked to consider the question of their disposition on this appeal, we express no present view on this matter. Recognizing, however, the possibility that unclaimed funds will be returned to the defendant,[7] we point to the Supreme Court holding in *Alyeska* as an additional reason why attorneys' fees should not now be charged against the entire escrow fund.

Reversed and remanded for further proceedings in accordance with this opinion.

OAKES, *Circuit Judge* (dissenting in part):

I first disavow the rhetoric of the majority directed at class actions and "class action lawyers." Class actions often are valuable tools for the individual plaintiff seeking justice against a defendant whose resources enable it to obtain the highest-paid lawyers to engage in such extensive discovery and other litigation techniques that one, two or three plaintiffs otherwise could never afford to conduct the lawsuit. This very case exemplifies the usefulness of class actions. Holders of $1.5 million of debentures that were worth $4 million only if converted by a given deadline were given inadequate and unreasonable notice of Boeing's intention to redeem the debentures and of the conversion

7 Those advocates of fluid class recovery who view class actions primarily as deterrents against wrongful conduct urge that unclaimed funds be disposed of in a manner similar to the cy pres doctrine of the law of trusts, or that they escheat to the state. 7A Wright & Miller, *Federal Practice and Procedure* § 1784 at 64 (Supp. 1976); S. Gordon, *Manageability Under the Proposed Uniform Class Actions Act*, 31 Sw. L.J. 715, 725 (1977); *Uniform Class Actions*, 63 A.B.A.J. 837, 842 (1977). However, even some proponents of fluid class recovery concede that under some circumstances it may be appropriate to return unclaimed funds to the defendant. *See, e.g.*, Uniform Class Actions Act (U.L.A.) § 15(b).

deadline. The class members therefore failed to exercise their conversion rights by the deadline. *Van Gemert* v. *Boeing Co.*, 520 F.2d 1373, 1378, 1383 (2d Cir.) (*Van Gemert I*), *cert. denied*, 423 U.S. 947 (1975). A decade of hard-fought difficult litigation has at last resulted in an award to the debenture holders which, had the original notice been sufficient, would have rightfully been theirs for the asking. In the process, against uphill odds, the lawyers for the now successful plaintiffs did an extraordinarily capable job, having even "made new law" on a complicated set of facts. Thus, criticism against class actions generally or plaintiffs' attorneys' fees in particular[1] falls flat when focused on the case at bar.

I am required to agree, however, with the basic theory of the majority opinion—that attorneys' *fees* are recoverable solely from the class members who file proper proofs of claim, rather than from the entire class fund—because so-called fluid class recovery was rejected in *Van Gemert* v. *Boeing Co.*, 553 F.2d 812, 815-16 (2d Cir. 1977) (*Van Gemert II*),[2] relying on *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). *Van Gemert II* is the "law of the circuit"; absent en banc treatment of the issue I am bound to follow it, therefore, whether or not I agree.

But this court's rejection of fluid class recoveries does not end the inquiry here. It seems to me that there is a

1 Those who criticize the fees of class action plaintiffs' lawyers seem to overlook the fees charged by class action defendants' lawyers. Could it be that a double standard is being applied?

2 *Van Gemert II* rejected the proposition that class members who file proper proofs of claim should be entitled to pro rata distribution of the unclaimed portion of the damage award. In doing so, it found unconvincing the argument that the unclaimed funds should be awarded to the claiming members of the class to defray their legal expenses. I agree with the majority to the extent that this holding precludes use of the unclaimed funds to pay the legal fees of class action attorneys.

sharp distinction between attorneys' fees and attorneys' disbursements. Plaintiffs' attorneys' fees in class actions generally being contingent, as they are here, are earned only if there is recovery. And *Van Gemert II's* implicit holding, *see* note 2 *supra,* that attorneys' fees may not be imposed on unclaimed funds, must be based on a similar theory—when there are no claimants, there is no "recovery"; thus this portion of the fund has not been "earned." Reimbursement of disbursements, by contrast, is not dependent on success. In fact, attorneys are precluded from expending funds on behalf of their clients unless the client remains ultimately liable for the expenses. *See* ABA Code of Professional Responsibility, Canon 5, Ethical Consideration 5-8, Disciplinary Rule 5-103(B). Accordingly, the number of ultimate claimants should not affect an attorney's right—perhaps his duty—to recover all disbursements from the entire fund. Additionally, fundamental principles of fairness underlying established law relating to recovery of expenses from a common fund,[3] *see Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970), militate in favor of permitting repayment of attorneys' disbursements out of the fund as soon as it is established. These expenses, incurred for the benefit of all, are necessary if there is to be recovery by anyone. Attorneys who advance such sums do so expecting, as they must, reimbursement. Furthermore, if they are only repaid per claimant—that is, by computing the amount that each class member would have to contribute if the whole award were claimed, and then charging the claiming class members for disbursements as if all potential claimants had filed—the attorneys would have to bear the loss for the portion of out-of-pocket costs attributable to entitled class members

3 *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 257, 264-65 n.39 (1975), expressly preserved the common fund doctrine.

who failed to file their claims.[4] This result simply does not make common sense. I therefore dissent in part.

4 Of course, if the filing claimants were required to absorb the total disbursements out of their pro rata share of the recovery, the attorneys would obtain complete reimbursement. But this would reduce the filing claimants' compensation and, in turn, be unfair to them.

The result of the majority decision, *ante* at 2099-2100, is either that the attorneys absorb the disbursements attributable to unfiled claims or that the claiming members of the class end by being responsible for paying all attorneys' disbursements—perhaps even fees—from their shares of the award. With either result I disagree.

APPENDIX C

Judgment and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 1820 (SJR)

WILLIAM R. VAN GEMERT, *et al.*,

Plaintiffs,

—against—

THE BOEING COMPANY (formerly BOEING AIRPLANE COMPANY) and THOMAS R. WILCOX,

Defendants.

A judgment having been duly entered in the above action on December 30, 1976 pursuant to an order of this Court dated December 27, 1976 adjudging and decreeing that plaintiffs, in behalf of all members of the plaintiff class, shall recover as their damages herein the principal sum of $3,289,359 and that all members of the plaintiff class shall be entitled to receive interest at the rate allowed in this District from the date of said judgment to the date of payment, and containing other provisions as therein more fully set forth, and an appeal having been taken by plaintiffs individually and on behalf of the members of the class to the United States Court of Appeals for the Second Circuit from so much of the judgment and order which denied prejudgment interest on said sum of $3,289,359 from March 29, 1966 and denied plaintiffs appellants' claim that said damage sum awarded should be increased to $4,026,762, and the Court of Appeals having rendered its decision on April 18, 1977 affirming in part and reversing in part the judgment and order appealed from and remanding the case to

the District Court, Southern District of New York, affirming the damages awarded to plaintiffs and the class and reversing that portion of the judgment which directed that no pre-judgment interest be awarded, holding that under N.Y.C.P.L.R. § 5001(a) an award of interest at the legal rates from the date of the breach, March 29, 1966, was mandatory.

Now upon the said opinion and mandate of the United States Court of Appeals for the Second Circuit in the above entitled action decided April 18, 1977, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiffs in behalf of all members of the plaintiff class, which consists of all holders on March 29, 1966 of 4½% Convertible Subordinated Debentures of the Boeing Company who failed to exercise their conversion right before it terminated on March 29, 1966, shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest thereon at the legal rates fixed by the State of New York, N.Y.C.P.L.R. § 5001(a) from March 9, 1966 to the date of this judgment, with costs to be taxed; and it is further

ORDERED that the members of the Plaintiffs Committee of Attorneys be awarded their fees, expenses and disbursements as fixed by the Court to be paid out of said total amount of this judgment; and it is further

ORDERED that each member of the plaintiff class who has not heretofore redeemed his debenture shall be entitled to receive the sum of $316.25 for each $100 face amount of debenture together with interest as set forth above, plus interest upon the redemption value of $103.25 from March 29, 1966 to the date of payment to the debenture-holders, after deducting such class member's proportionate share of the total amount allowed for attorneys' fees, expenses and disbursements; each class member's proportionate

share shall bear the same ratio to all such fees, expenses and disbursements as such class member's recovery shall bear to the total recovery provided for herein; and it is further

ORDERED that each member of plaintiff class who has heretofore redeemed his debenture shall be entitled to receive the sum of $213 for each $100 face amount of debentures together with interest as set forth above, plus interest upon the redemption value of $103.25 from March 29, 1966 to the date of redemption, after deducting such class member's proportionate share of the total amount allowed for attorneys' fees, expenses and disbursements; each class member's proportionate share shall bear the same ratio to all such fees, expenses and disbursements as such class member's recovery shall bear to the total recovery provided for herein; and it is further

ORDERED that within 15 days after the entry of this judgment the defendants shall deposit the amount of this judgment plus interest at the rate of 6% per annum to the date of such deposit, in a commercial bank, a savings institution or other depository in the Borough of Manhattan, City of New York, upon which interest shall accumulate until disbursed, and that such monies shall be so held in escrow pending the further order of this Court; and it is further

ORDERED that affidavits in support of the fees to be awarded to the attorneys for the class shall be submitted to this Court within twenty days after the entry of this judgment; and it is further

ORDERED that George J. Solleder Jr., Esq., of 19 Rector Street, New York, New York, Telephone Number BO 9-2222, is hereby appointed Special Master with all the powers enumerated in Rule 53 of the Federal Rules of Civil Pro-

cedure to direct the parties in the necessary ministerial steps to effectuate the Judgment, receive all proofs of claim to participate in the Fund established by the Judgment, pass on the validity of same, direct the giving of notices to interested persons of hearings on disputed claims, conduct the necessary hearings, submit reports thereon and in general supervise the administration of the Judgment and decide all disputed questions of law and fact connected therewith subject to confirmation by the Court; all expenses incurred by the Special Master, including his fee, shall be paid out of the Fund; and it is further

ORDERED that this Court shall reserve and retain jurisdiction of this action pending the implementation of this order and judgment, for the making of such further orders or any other acts as may be necessary to carry out the purpose of this order and judgment.

Dated: New York, New York
June 30, 1977

/s/ SYLVESTER J. RYAN
U.S.D.J.

WILLIAM R. VAN GEMERT, *et al.* v. THE BOEING COMPANY and THOMAS R. WILCOX

ENDORSEMENT

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66 Civ. 1820

Defendants' motion for an Order amending a portion of the Judgment and Order of this Court dated June 30, 1977 is denied.

The following parts of the Judgment and Order are claimed by the movants to be contradictory and violative of the Court of Appeals decision in this case (553 F.2d 812) and the holdings in other cases cited in the supporting memorandum.

> "ORDERED that the members of the Plaintiffs Committee of Attorneys be awarded their fees, expenses and disbursements as fixed by the Court to be paid out of said total amount of this judgment; . . .".
>
> • • •
>
> "after deducting such class member's proportionate share of the total amount allowed for attorneys' fees, expenses and disbursements; each class member's proportionate share shall bear the same ratio to all such fees, expenses and disbursements as such class member's recovery shall bear to the total recovery provided for herein: . . .",

These provisions do not depart from the Court of Appeals decision. The Court of Appeals ruled that those class members who file proofs of claim are not entitled to either a pro rata portion of the damage award which remains unclaimed nor to the unclaimed funds in order to defray the legal expenses of the claiming members.

Under the circumstances of this protracted suit, it is equitable that all class members both claiming and non-claiming, if any, bear a pro rata portion of the fees, expenses, disbursements and administration costs and the Judgment and Order so provides.

So ordered.

Dated: New York, New York
September 22, 1977

/s/ SYLVESTER J. RYAN
Senior U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Nos. 879, 880, Dockets 77-7009, 77-7031

Argued Feb. 25, 1977

Decided April 18, 1977

WILLIAM R. VAN GEMERT et al.,

Plaintiffs-Appellants,

v.

THE BOEING COMPANY AND THOMAS R. WILCOX,

Defendants-Appellees.

Before MANSFIELD and VAN GRAAFEILAND, Circuit Judges, and MISHLER, District Judge.*

VAN GRAAFEILAND, Circuit Judge:

This appeal arises from a consolidated class action brought by non-converting holders of the Boeing Company's 4½% convertible subordinated debentures due July 1, 1980. The amended complaint alleges that appellants had received inadequate notice of Boeing's intention to call the convertible debentures in question and were therefore unable to exercise their conversion rights prior to the deadline for the call which was midnight, March 29, 1966. The redemption price for each $100 of principal amount of debentures was $103.25. However, if appellants had been able to meet the call deadline, they could have converted each $100 of principal amount of debentures into at least

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* Chief Judge, Eastern District of New York, sitting by designation.

two shares of common stock. On March 29, 1966 the common stock obtainable for each $100 of debentures was worth $316.25. Within thirty days thereafter the stock was worth $364. Damages demanded by appellants are based on the difference between the redemption price and the value of the common stock.

Originally, the District Court dismissed the complaint. On appeal, this Court reversed that judgment and remanded to the District Court for a determination of damages. *Van Gemert* v. *Boeing Co.*, 520 F.2d 1377 (2d Cir.), *cert. denied*, 423 U.S. 947, 96 S.Ct. 364, 46 L.Ed.2d 282 (1975). District Judge Ryan has now made that determination, and the case is once again before this Court.

Judge Ryan awarded damages based on the value of Boeing's common stock on March 29, 1966, which, as noted previously, was the cut-off date for the exercise of conversion privileges. He awarded no prejudgment interest. Appellants take exception to both of these rulings. They contend that, under New York's "fluctuating value" test, Judge Ryan should have valued the Boeing common stock as of April 14, 1966, when two shares of that stock were worth $364. Additionally, appellants assert that the District Court should have awarded prejudgment interest. We believe that Judge Ryan properly valued the stock as of March 29, 1966. However, we agree with appellants that they are entitled to pre-judgment interest.

[1] We are satisfied that *New York law controls* both of these questions. In our prior opinion, we found that appellants' federal claims were sufficient to provide the District Court with jurisdiction over the case. *Id.* at 1382. However, the relief granted appellants was founded on State law. In finding that Boeing had failed to provide the debenture holders with reasonably adequate notice of the redemption, we held that:

> The duty of reasonable notice arises out of the contract between Boeing and the debenture holders, pursuant to which Boeing was exercising its right to redeem the debentures.

Id. at 1383. It is the source of the right, not the basis of federal jurisdiction, which determines the controlling law. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F.2d 538, 540 n.1 (2d Cir. 1956); *see* 13 C. Wright, A Miller & E. Cooper, Federal Practice and Procedure § 3567, at 462 (1975). Consequently, in determining the proper measure of damages, New York State law is controlling.

Appellants urge us to apply the "fluctuating value" rule formulated by the New York courts for situations where there has been a conversion of stock. Succinctly stated, this rule provides that:

> The measure of damages for conversion of stock certificates is the cost of replacement within a reasonable period after the discovery of the conversion, regardless of when the conversion may have occurred .... (Citations omitted).

Hartford Accident & Indemnity Co. v. *Walston & Co.*, 22 N.Y.2d 672, 673, 291 N.Y.S.2d 366, 367, 238 N.E.2d 754 (1968). This rule does not apply to the facts of the instant case, however.

In both *Baker* v. *Drake*, 53 N.Y. 211 (1873) and *Mayer* v. *Monzo*, 221 N.Y. 442, 117 N.E. 948 (1917), cases relied upon by appellants, it was alleged that stockbrokers sold their principal's stock without authorization. The owners of the stock were holding these securities, hoping to realize a profit from their sale. *Baker* v. *Drake, supra*, 53 N.Y. at 216. The *Baker* court explained the theory on which damages

would be awarded when stock held for this purpose was converted.

> If, upon becoming informed of the sale, he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity.

Baker v. *Drake, supra,* 53 N.Y. at 217.

The situation presented in the instant case is wholly different from the circumstances existing in *Baker* and its progeny. Here, appellants never owned any common stock of Boeing and do not claim to have purchased any. *See Hartford Accident & Indemnity Co.* v. *Walston & Co., supra,* 22 N.Y.2d at 673, 291 N.Y.S.2d 366, 238 N.E.2d 754. In reality, appellants are asking us to treat them as if they were owners of the stock on the cut-off date, March 29, and to speculate that they would have sold these shares at the highest price reached within a reasonable time thereafter. Such a theory of damages was specifically rejected in *Simon* v. *Electrospace Corp.,* 28 N.Y.2d 136, 145, 320 N.Y.S.2d 225, 269 N.E.2d 21 (1971).

[2] In our former opinion we held that appellants' right to damages arose out of their contract with Boeing. *Van Gemert* v. *Boeing Co., supra,* 520 F.2d at 1383. We are confident that, faced with the facts presented here, the New York courts would apply a breach of contract theory of damages, resulting in the Boeing stock being valued as of the cut-off date, March 29, 1966. In *Simon* v. *Electrospace*

Corp., supra, the defendant breached its contract to deliver shares of stock to the plaintiff for services rendered. The *Simon* court stated:

> The proper measure of damages for breach of contract is determined by the loss sustained or gain prevented at the time and place of breach . . . . The rule is precisely the same when the breach of contract is nondelivery of shares of stock . . . . Plaintiff was never the owner of the stock of Electrospace just because defendant breached its contract to deliver the shares. That breach and the loss caused was fixed and determined in 1967 . . . [and that was] the time when the value to him of defendant's performance was to be measured. It was then that plaintiff was to be made whole and not at some future time never specified in the agreement. (Citations omitted).

Simon v. *Electrospace Corp., supra,* 28 N.Y.2d at 145, 320 N.Y.S.2d 225, 232-233, 269 N.E.2d 21, 26. The cases dealing with converted stock were referred to by the *Simon* court but did not control, because there, as here, the plaintiff did not own the stock. Boeing had the right to call the debentures as of March 29, 1966. However, it breached its contract with the debenture holders by failing to give them reasonably adequate notice of its action, thereby precluding them from participating in the call. We hold that the breach occurred on March 29, 1966; and, for the purpose of computing damages herein, the Boeing stock should be valued as of that date.

New York law also controls on the issue of pre-judgment interest. Appellants contend that the awarding of interest is mandatory under N.Y.C.P.L.R. § 5001(a). Boeing, on the other hand, asserts that our previous decision in effect reformed the contract between it and the debenture holders. Because reformation is an equitable doctrine, *see Brand-*

wein v. *Provident Mutual Life Insurance Co.*, 3 N.Y.2d 491, 494, 168 N.Y.S.2d 964, 146 N.E.2d 693 (1957), Boeing argues that the awarding of interest was discretionary with the District Court.

[3, 4] Boeing's reliance on the doctrine of reformation is misplaced. In our prior decision, we did not rely on a mutual mistake between the parties in expressing the terms of their agreement. Neither did we find unilateral mistake on the part of the debenture holders occasioned by Boeing's fraud. We did find significant, however, the fact that the debentures did not explicitly set forth the type of notice which appellants could expect if Boeing decided to call the bonds. Without such a declaration, we held as a matter of law that appellants were entitled to expect that Boeing would employ a method of notification reasonably calculated to inform the debenture holders of the call. In doing so, we merely applied the settled principle, "that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . ." *Kirke La Shelle Co.* v. *Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933). Simply stated, every contract contains the implied requirement of good faith and fair dealing. Boeing was found liable therefore because it breached its contract with appellants, and damages were awarded. Under N.Y.C.P.L.R. § 5001(a), an award of interest from the date of the breach, March 29, 1966, is mandatory. *See Spang Industries, Inc.* v. *Aetna Casualty & Surety Co.*, 512 F.2d 365, 371 (2d Cir. 1975).[1]

[1] On remand, the District Court should compute interest at the various legal rates applicable under New York law during the period from March 29, 1966 to the date that judgment is entered. *Spang Industries, Inc.* v. *Aetna Casualty & Surety Co.*, *supra*, 512 F.2d at 372; *see Kaufman* v. *Chase Manhattan Bank National Association*, 370 F.Supp. 279, 280 (S.D.N.Y. 1974).

[5] On March 30, 1966, $1,544,300 in principal amount of unregistered debentures had not been converted. Therefore the class as a whole suffered damages of $3,289,359, exclusive of pre-judgment interest. This sum with interest represents the maximum amount to be distributed should all possible class members be identified and file proofs of claim. On appeal, certain appellants raise the question of whether class members who file proper proofs of claim should be entitled to receive on a pro rata basis any portion of the damage award which remains unclaimed. Boeing, of course, contends that the unclaimed money should be returned to the corporation.

We see no reason to change our position, firmly stated in *Eisen* v. *Carlisle & Jaquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), disallowing a "fluid class" recovery such as sought by appellants. Although, in *Eisen*, the fund created by the unclaimed damages was to be used to benefit individuals who were arguably not members of the class, there is no difference in concept between the relief at issue in that case and the relief requested here, which in effect seeks distribution of the unclaimed portion to a "next-best" class. Moreover, there is even less to recommend appellants' proposal than the similar relief suggested in *Eisen*.[2]

The problems inherent in appellants' proposal are readily apparent.

> [T]his method expressly contemplates that silent class members will not receive any compensation, even

[2] In *Eisen* the class consisted of those who had bought or sold odd lots on the New York Stock Exchange in the period from May 1, 1962 through June 20, 1966. The undistributed funds were to be used, "for the benefit of all odd-lot traders by reducing the odd-lot differential 'in an amount determined reasonable by the court until such time as the fund is depleted' ". *Eisen* v. *Carlisle & Jaquelin*, *supra*, 479 F.2d at 1011.

> indirectly. The claims of the silent class members would be expropriated and a windfall might result for those who appeared and collected their share of the damages. Consequently, this procedure might encourage the bringing of class actions likely to result in large uncollected damage pools. It also raises serious questions as to the adequacy of representation where the interests of the named plaintiffs lie in keeping the other class members uninformed. In sum, the deficiencies of this method of distribution make it a generally unacceptable alternative. (Footnote omitted).

Note, *Damage Distribution in Class Actions: The Cy Pres Remedy,* 39 U.Chi.L.Rev. 448, 453 (1972). Appellants argue, however, that they should receive the unclaimed funds to defray the legal expenses of the claiming members of the class; in essence, that Boeing should pay, at least in part, their legal fees and disbursements. The simple answer to this argument is that, what appellants may not gain directly, *see Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), they may not gain indirectly, and certainly not through such an imperfect vehicle as they have proposed. Without regard to the constitutionality of a "fluid class" award, *Eisen* v. *Carlisle & Jaquelin, supra,* 479 F.2d at 1018, the circumstances here simply do not call for this extraordinary remedy.

The case is remanded to the District Court for entry of a judgment in accordance with this opinion.

APPENDIX E

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 321-25—September Term, 1974.

(Argued February 26, 1975 Decided July 14, 1975.)

Docket Nos. 74-1157-59, -1165, -1185

WILLIAM R. VAN GEMERT, et al.,

Appellants,

—v.—

THE BOEING Co., et al.,

Appellees.

Before:

LUMBARD, OAKES and TIMBERS,

Circuit Judges.

Suit by holders of convertible debentures who failed to convert prior to company's redemption claiming insufficient notice of redemption provided. The United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*, held that the notice provided by the company complied with the provisions in the debenture and underlying Trust Indenture; that the Trust Indenture Act of 1939 and the company's Listing Agreement with the New York Stock Exchange were not violated; and that appellants had no standing to raise a claim based upon an alleged failure to make a necessary adjustment in the

conversion rate. Held, that the appellants had stated a valid claim.

Judgment reversed.

STUART D. WECHSLER, KASS, GOODKIND, WECHSLER & GERSTEIN, New York, N.Y.; Sachnoff, Schrager, Jones & Weaver, Ltd., Chicago, Ill.; Elson, Lassers & Wolfe, Chicago, Ill., *for Appellants*.

NORMAN WINER, NATHAN, MANNHEIMER, ASCHE, WINER & FRIEDMAN, New York, N.Y., *for Appellants*.

S. HAZARD GILLESPIE, DAVIS POLK & WARDWELL, New York, N.Y. (David E. Wagoner, Perkins, Coie, Stone, Olsen & Williams, Seattle, Wash., William H. Levit, Jr., Hughes, Hubbard & Reed, Los Angeles, Cal., of counsel), *for Appellees*.

OAKES, *Circuit Judge:*

This appeal is from a judgment dismissing the amended complaint in a consolidation class action brought by nonconverting holders of The Boeing Company's "4½% Convertible Subordinated Debentures, due July 1, 1980." The complaint was jurisdictionally based on the Securities Exchange Act of 1934 as amended, the Securities Act of 1933 as amended, the Trust Indenture Act of 1939 as amended and the principles of pendent jurisdiction.[1] The gist of the complaint was that the appellants and their class had inadequate and unreasonable notice of Boeing's intention to redeem or "call" the convertible debentures in question and were hence unable to exercise their conversion

1 *See* note 19 *infra*.

rights before the deadline in the call of midnight, March 29, 1966. Their damage lay in the fact that the redemption price for each $100 of principal amount of debentures was only $103.25, while under the conversion rate of, at a minimum, two shares of common stock for each $100 of principal amount of debentures, the stock was worth $316.25 on March 29, 1966, the cut-off date for the exercise of conversion privileges, or within 30 days thereafter, $364.00. The named appellants number 56, and the total loss alleged is over $2 million.

The United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*, held that Boeing complied with the notice provisions spelled out in the debentures and in the Indenture of Trust Dated July 1, 1958 (the Indenture), between Boeing and The Chase Manhattan Bank (Chase), Trustee, and that it was required to do no more; that the Trust Indenture Act of 1939, 15 U.S.C. §§77aaa *et seq.*, was not violated; that if Boeing's Listing Agreement with the New York Stock Exchange (NYSE) were violated, it gave appellants no claim for relief; and that even if, as appellants claim, an adjustment in the conversion rate were required, and that failure to make the adjustment gave rise to a cause of action, appellants had no standing to raise the claim since they did not exercise their conversion rights. We reverse and remand on the ground that there was an obligation on Boeing's part to give reasonably adequate notice of the redemption to the debenture holders, which obligation was not fulfilled in this instance.

Most of the facts are not in dispute; indeed, we commend the parties, and the court below, for agreeing to a 59-page statement as to facts, incorporating some 55 exhibits, and to what certain witnesses would testify if called at trial.

THE ISSUE OF DEBENTURES

On July 15, 1958, each Boeing shareholder was given the right to purchase $100 of convertible debentures for each 23 shares of stock then held.[2] The debentures were to pay interest of 4½ per cent per annum and were to be convertible by the debenture-holder into common stock at a rate (subject to adjustment) of two shares per $100 principal amount of debentures. Chase was appointed trustee under the Indenture Agreement, and the debentures, as well as the stock reserved for issuance upon conversion of the debentures, were listed on the NYSE. Application for such listing had been made pursuant to a Listing Agreement between Boeing and the Exchange.

Subscriptions for a total of $29,578,500 of debentures were received[3] and the balance of $1,019,100 was purchased by the underwriters. Chase as trustee then authenticated and the subscription agent delivered by registered mail the entire $30,597,600 aggregate amount of debentures in coupon form to the persons designated in the warrants surrendered or their agents,[4] but no list of these was kept by Boeing or Chase.[5]

2 Total trading in the debenture rights was 1,702,200, but since no information is available on the number or retrades there is no way of knowing exactly how many rights were not traded. At the least, however, 5,335,248 rights were not traded on the Exchange.

3 One may estimate, from the number of rights not traded on the Exchange, approximately $21 million worth of the debentures were purchased by Boeing stockholders or their donees.

4 Between August 4, 1958, when the debentures were admitted to trading on the NYSE, and March 29, 1966, when conversion rights expired, a total of $68,694,000 face amount of debentures were traded. It is not known how many of the debentures were held by original subscribers at the later date.

5 City Bank-Farmers Trust Company, the subscription agent, retained through the ultimate date on which conversion rights expired the names and addresses of stockholders to whom the warrants were sent, as well as lists of the names and addresses of stockholders of record for the payment of dividends in May and August of 1958, and the warrants themselves when they were tendered. Although the list of stockholders was destroyed in 1964, the warants which bear the names and addresses of the original subscribers are presently in the possession of a successor agent.

A number of provisions in the debenture, the Indenture Agreement, the prospectus, the registration statement for the debentures and the Listing Agreement with the NYSE dealt with the possible redemption of the debentures by Boeing and the notice debenture-holders were to receive of a redemption call so that they might timely exercise their right to convert the debentures into common stock rather than have their debentures redeemed at face value. The debentures themselves provided:

> The holder of this Debenture is entitled, at his option, at any time on or before July 1, 1980, or in case this Debenture shall be called for redemption prior to such date, *up to and including but not after the tenth day prior to the redemption date, to convert this Debenture* . . . at the principal amount hereof, or such portion hereof, into shares of Capital Stock of the Company . . .
>
> . . . .
>
> The Debentures are *subject to redemption* as a whole or in part, at any time or times, at the option of the Company, *on not less than 30 nor more than 90 days' prior notice, as provided in the Indenture,* at the following redemption prices (expressed in percentages of the principal amount) . . .
>
> . . . .
>
> This Debenture may be registered as to principal upon presentation at the office or agency of the Company, in the Borough of Manhattan, The City of New York, New York, . . .

(Emphasis added.)

The Indenture itself, a 113-page printed booklet, provides in Art. V, § 5.02, as follows:

> In case the Company shall desire to exercise the right to redeem all or any part of the debentures, as the case may be, pursuant to Section 5.01, it shall publish prior to the date fixed for redemption a notice of such redemption at least twice in an Authorized Newspaper, the first such publication to be not less than 30 days and not more than 90 days before the date fixed for redemption. Such publication shall be in successive weeks but on any day of the week. . . .[6]

The Indenture also provided that debenture-holders who registered their bonds would receive notice by mail of any redemption call by the Boeing directors.

While the prospectus for the debenture issue did not refer to any registration rights, it did state that redemption could occur "on not less than 30 days' and not more than 90 days' published notice."

The NYSE Listing Agreement dated November 5, 1957, incorporated by reference into the listing application filed by Boeing in respect to the debenture issue, provided in Part III, Paragraph 4, as follows:

> 4. The Corporation will *publish immediately to the holders* of any of its securities listed on the Exchange *any action taken* by the Corporation *with respect* to dividends or to the allotment of rights to subscribe or *to any rights or benefits pertaining to the ownership of its securities listed on the Exchange;* and will give prompt notice to the Exchange of any such action; and *will afford the holders of its securities listed on the Exchange a proper period within which* to record their interests and *to exercise their rights.* . . .

(Emphasis added.)

6 An "Authorized Newspaper" is defined as one published at least five days a week and of general circulation in the borough of Manhattan, N.Y. *See* Indenture, Art. I, § 1.01.

Section A10 of the NYSE "Company Manual" specifically defines what is meant by publicity in the Listing Agreement:

> Publicity: *The term "publicity,"* as used . . . below, and *as used in the listing agreement* in respect of redemption action, *refers to a general news release, and not to the formal notice or advertisement of redemption* sometimes required by provisions of an indenture or charter.
>
> *Such news release shall be made as soon as possible after corporate action which will lead to, or which looks toward, redemption* is taken . . . and shall be made by the fastest available means, i.e., telephone, telegraph or hand-delivery.
>
> To insure coverage which will adequately inform *the public,* the news should be released to at least *one or more newspapers of general circulation in New York City which regularly publish financial news,* or *to one or more of the national news-wire services* (Associated Press, United Press International), in addition to such other release as the company may elect to make.

Section A10 of the Company Manual also provides specifically that when a convertible security is to be redeemed, the news release must include the rate of conversion and the date and time when the conversion privilege expires. It further provides that in addition to the immediate news release the company must give notice immediately to the NYSE itself, so as to enable the NYSE to take any necessary action with respect to further trading in the security.

THE CALL AND ITS CIRCUMSTANCES—HEREIN OF THE NOTICE ACTUALLY GIVEN

On February 28, 1966, the Boeing board of directors *inter alia* authorized the president, vice president-finance or treasurer to call for redemption on a date to be selected by them or any one of them, all of the convertible debentures outstanding under the indenture of July 1, 1958. That same day a news release, headlining 1965 sales and net earnings, and referring to a contemplated stock increase, stock split and post-split dividends, mentioned that "[t]he company's management was also authorized to call for redemption at a future date all of company's outstanding 4½ percent convertible subordinated debentures." This statement, which did not mention even the tentative dates for redemption and expiration of the conversion rights of debenture holders that had been settled upon, was released by the Boeing "News Bureau" nationally to the financial editors of the New York Times, the New York Herald-Tribune, the Wall Street Journal and other major national newspapers, in addition to the major wire services (Associated Press, United Press International and Dow Jones & Co.).

A short time after the February 28 board meeting, Boeing firmed up the key dates, complied with the indenture notice requirements and communicated to some extent with the Exchange proper. On March 2, 1966, at the home office in Seattle, at a meeting of Boeing officers, bankers and lawyers, it was decided to fix March 8 as the date for the first publication of the formal notice of redemption, April 8 as the redemption date and March 29 as the date for expiration of the conversion privilege. The second date for publication of the formal notice, March 18, was also fixed upon at this March 2 meeting, and Chase was notified to publish the redemption notice on those dates in all editions of the Wall Street Journal. All editions of the Journal carried the formal notices on March 8 and 18; the notices were in due form if not of extensive size.[7] It is conceded by the appellants that the formal requirements of the Indenture were met by the Company and Trustee.

It was not until March 7, the day before the publication of the first formal notice of redemption, that the NYSE was itself notified of the firmed-up dates for redemption,[8] conversion and notice. This was done by a telephone call from Company counsel in Seattle to the Exchange. While the court below found in part that "Boeing did comply with the publicity requirements of the Exchange" and while Company counsel "felt" on the basis of his telephone call "that we had complied with the recommended procedures [of the Stock Exchange Manual]," this finding and feeling are in the face of Boeing's response *admitting* appellants' demand for admission

> That Boeing did not issue any general publicity release, as that term is defined in Section A-10 of the New York Stock Exchange Company manual, concerning the call of the debentures during the period from March 1, through March 24, 1966.

This admission was reconfirmed by counsel for Boeing below and on appeal in the course of an "opening" statement to the court. The original news release of February 28 did not qualify since the dates of conversion and redemption had not been fixed and the Manual requires in the case of convertible securities that the publicity set forth "the rate of conversion and the date and time when the conversion privilege will finally expire" and that if

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7 We estimate their size as 5" x 5½".

8 The Exchange had been sent a communication concerning the redemption on March 1, 1966, but at that time no redemption date had been established.

such data are not known at the time publicity is given initially, "similar publicity shall be given immediately it becomes known or determined." The formal notices did not qualify since the Manual refers to a "general news release," and not to the formal notice or advertisement of redemption. In this regard it is interesting to note that a letter dated March 9 from the stock list department of the Exchange to Boeing indicates that "We have noted the recent advertisement advising of the call for redemption" and also asks for a copy of the authorizing resolution.

There was, in short, no general news release as called for by the Listing Agreement as amplified in the Company Manual until on the eve of expiration of the conversion rights, March 25, 1966, it appeared that $10,849,300 face amount of debentures—over one-half of those outstanding at that time—remained unconverted. At that point Boeing issued a press release[9] and then on March

9 DEBENTURE CONVERSION DATE MARCH 29

Final date for conversion of The Boeing Company's 4½ per cent convertible subordinated debentures to Boeing common stock is Tuesday, March 29, as announced in advertising by the company on March 8, 9 and 10.

The conversion rights provide for issuance of two shares of common stock in the company for each $100 bond. The company's notice of redemption announced that all outstanding debentures would be redeemed on or after April 8 at the redemption price of 103.25 per cent of their principal amount, together with accrued interest to that date.

Closing price of the stock as of March 25 was $154.5, representing a substantial advantage to holders of the bonds if the conversion is elected.

From January 1, 1965 through March 25, 1966, the sales price for the common stock of The Boeing Company ranged from a high of $175.25 to a low of $60.375 per share. As was pointed out in the notice of redemption, so long as the market price of the common stock is $52.24 or more per share, a debenture holder would receive upon conversion before the March 29 deadline, common stock having a greater value than the cash he would receive if he surrendered the debenture for redemption.

28 the Company republished its earlier advertisement in all editions of the Wall Street Journal (Eastern, Mid-Western, Pacific Coast and South-West) and the New York Times, and additionally advertisements were placed. This later action had what the court below termed a "dramatic and widespread rippling effect." Some $9,305,000 of debentures were converted on March 28 and 29. The ripples, however, had not spread to the appellants' class by the midnight deadline on the 29th; they literally went to sleep with $1.5 million of debentures that were worth $4 million if only converted.

It is true, however, and the court did properly find, that in addition to the publication of the two formal indenture notices, notices of the dates of the call and the expiration of the conversion privilege on March 29, 1966, were carried on the following services: NYSE ticker on March 8, 23, 24, 25, 26 and 28, 1966; NYSE Bulletin on March 11, 18 and 25, 1966; The Commercial and Financial Chronicle on March 14, 21 and 28, 1966; Standard & Poor's Bond Outlook on March 19, 1966; Standard & Poor's Called Bond Record on March 9, 11, 18 and 25, 1966; Moody's Industrials on March 11, 1966. Articles about these dates were also carried in the Seattle Post Intelligencer on March 25, 1966; the Seattle Times on March 27, 1966; and the Financial World on March 23, 1966; and the notice was also carried in the Associated Press Bond Tables published on one or more days in at least 30 newspapers published in major cities across the United States. But almost all of these notices or items were in fine print, buried in the multitude of information and data published about the financial markets and scarcely of a kind to attract the eye of the average lay investor or debenture holder. On March 9, 1966, the listing in the New York Times for the convertible debentures read, for example: "Boeing cv 4½ s 80." The change

on March 10 was to "Boeing 4½ s 80 cld," giving the investor in Dubuque or Little Rock or Lampasas only 19 days to pick up this change and figure that "cld" meant "called." Proof of the inadequacy of these notices lies in the fact that, despite the dramatic disparity between the value of the debentures unconverted and the conversion stock, over one-half of the debentures outstanding on the date of the first notice remained unconverted until the general publicity release on the eve of expiration of the conversion privilege.[10]

Because the appellants place some emphasis on the fact, although we do not reach their contention of unreasonable notice based on it, we should mention that Boeing made no attempt to mail notice to the original subscribers (which could have been done at concededly nominal expense), and neither Boeing nor Chase inquired of or gave notice to collecting banks which had tendered for collection coupons bearing the payment dates of July 15, 1965, or January 15, 1966, the last two coupons before the redemption, either of which might have had some beneficial effect.[11]

The Contentions of the Parties

Boeing rests its defense primarily upon the notice specified in the debentures and Indenture, pointing out that in 1958 when the debentures were issued, "the risk that actual notice might not be received by subsequent holders of the debentures was clearly accepted by all even re-

10 On March 8, 1966, $21,514,700 face amount of debentures were still outstanding. On March 25, 1966, as stated, four days before the expiration of the conversion privilege, over one-half of these $10,849,300, had not been converted.

11 Nor do we reach the legal argument under the Trust Indenture Act, 15 U.S.C. § 77bbb, based upon the Indenture's provisions requiring Boeing to give Chase lists of the names and addresses of debenture holders obtained by the former, and the token compliance therewith.

motely familiar with the nature of such debentures." (Brief at 20-21.) It was "just such a risk" that led Boeing to extend to its stockholders and others who were investing $30 million in these securities the opportunity to register, *see Kaplan* v. *Vornado, Inc.*, 341 F. Supp. 212, 216 (N.D. Ill. 1971), an opportunity availed of by only 7 per cent of the debenture holders.[12] For the proposition that notice by publication provided for here was "standard and conformed with the custom and practice prevailing in the trade in 1958," we are referred by Boeing to *Gampel* v. *Burlington Industries, Inc.*, 43 Misc. 2d 820, 252 N.Y.S.2d 500 (Sup. Ct. 1964), where Justice Korn did not discuss the custom and practice in the trade but did hold that publication in the Wall Street Journal even during a newspaper delivery strike conformed to a provision in the Burlington Industries debentures similar to the one in the case at bar.[13]

There are four main strings to the appellants' bow. The first is that Boeing is civilly liable under federal law for violation of the NYSE Listing Agreement and Section A10 of the NYSE Company Manual since their requirements are an extension of the Securities Exchange Act of 1934 and an integral part of the statutory scheme under which exchanges are required to adopt rules, 15 U.S.C. § 78f, which may be ordered by the Commission to be altered, 15 U.S.C. § 78s, and the violation of which may give rise to a civil action under federal law. *Cf. Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135 (7th Cir.), *cert. denied*, 396 U.S. 838 (1969). The second

12 Through April 8, 1966, $1,838,000 in face amount of the debentures were registered as to principal and interest and $337,700 as to principal only; thus, approximately 7 per cent of the debentures were in fact registered so that their holders thereby automatically received notice from the trustee.

13 *See generally* Miller, *How to Call Your Convertibles*, Har. Bus. Rev. 66 (May/June 1971).

is that appellants are third party beneficiaries under state law of the Boeing-NYSE Listing Agreement, as amplified by the Company Manual. *Lawrence* v. *Fox*, 20 N.Y. 268 (1859). *See Weinberger* v. *New York Stock Exchange*, 335 F. Supp. 139 (S.D.N.Y. 1971) (Gurfein, *J.*) (Exchange liable under agreement with SEC to limited partner of bankrupt member firm inadequately supervised by Exchange). The third claim of appellants is that the Indenture is in the nature of a contract of adhesion, a standardized contract between parties of disparate bargaining power, unconscionable features of which are unenforceable as a matter of policy, a concept perhaps first advanced as to indentures of trust covering convertible debentures in a student note, *Convertible Securities: Holder Who Fails to Convert Before Expiration of the Conversion Period*, 54 Cornell L. Rev. 271 (1969). *Cf. Gray* v. *Zurich Insurance Co.*, 65 Cal.2d 263, 269, 419 P.2d 168, 171, 54 Cal. Rptr. 104, 107 (1966). *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629 (1943). The fourth ground is that the call was illegal and therefore void because it was based upon a conversion rate of 2.00 shares per $100 face amount of debentures when as a result of two stock dividends and an acquisition it should have been on a 2.05 or a 2.08 ratio.

THE FEDERAL LAW CLAIM

The claim that Boeing is civilly liable under federal law for violation of the NYSE Listing Agreement and Section A10 of the Company Manual is a colorable one. The Listing Agreement and Company Manual are "instruments corresponding" to rules of the Exchange within Section 6(a)(3) of the Securities Exchange Act of 1934, 15 U.S.C. § 78f(a)(3). For the debentures here in question to be listed on the Exchange, application under the Listing

Agreement had to be made. Boeing did not comply with the publicity requirements of the Exchange. In *O'Neill* v. *Maytag*, 339 F.2d 764, 770 (2d Cir. 1964), we did say, however, in the context of a stockholder's derivative suit arising out of an air carrier's purchase of its own stock, that a transaction which violated an Exchange rule did not give rise to a cause of action under federal law, at least against a listed company or its officers.

But as the Supreme Court held in *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), private parties have both derivative and direct rights of action to bring suit for violations of the Securities Exchange Act of 1934 and SEC rules and regulations issued thereunder, rights the explication of which take up a fair amount of Second Circuit judicial time. We extended this at least by dictum to include violation of stock exchange and securities dealers' association rules designed for the direct protection of investors, at least in a suit against an Exchange member, in *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966). There, Judge Friendly, speaking for a unanimous court, pointed out that "the concept of supervised self-regulation is broad enough to encompass a rule which provides what amounts to a substitute for a regulation by the SEC itself." 358 F.2d at 182. Again, "[a] particular stock exchange rule could thus play an integral part in SEC regulation notwithstanding the Commission's decision to take a back-seat role in its promulgation and enforcement . . . ," *id.*, giving as an example NYSE Rule 452 which prohibits a member from voting stock held in a street name without specific instructions from the beneficial owner. *Id.* at n.4. Judge Friendly then went on to say that

> what emerges is that whether the courts are to imply federal civil liability for violation of exchange or dealer association rules by a member cannot be deter-

> mined on the simplistic all-or-nothing basis urged by the two parties; rather, the court must look to the nature of the particular rule and its place in the regulatory scheme, with the party urging the implication of a federal liability carrying a considerably heavier burden of persuasion than when the violation is of the statute or an SEC regulation. The case for implication would be strongest when the rule imposes an explicit duty unknown to the common law.

Id.[14] *See* Lowenfels, *Liability under Exchange Rules*, 2 Rev. of Securities Regulation 841 (1969). *See also Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc., supra* (upholding implied private right based upon the so-called "Know Your Customer" rule, which is Rule 405 of the NYSE, against a party not a stock exchange member).

Nevertheless, we do not now take the position that appellees advance and the court below apparently accepted, that violation of an exchange rule cannot under any circumstances give rise to civil liability under the federal acts. Such a position would be in conflict with our own most recent statements on this subject as well as some of the developing case law. *See, e.g.*, Judge Weinfeld's opinion in *Starkman* v. *Seroussi*, CCH Fed. Sec. L. Rep. ¶ 94,600 [1973-74 transfer binder] (S.D.N.Y. 1974) (con-

14 The court went on to hold, however, that the rules at issue in *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966), were "near the opposite pole," that is to say, they were "something of a catchall" which related to unethical behavior as well as illegal conduct. It is to be noted that *Colonial Realty* was not the first Second Circuit case dealing with stock exchange rules. In *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), the court recognized that culpable failure by a stock exchange to enforce rules adopted pursuant to § 6(b) of the Securities Exchange Act might give rise to a federal claim against the *exchange* by an investor injured thereby. *See also Silver* v. *NYSE*, 302 F.2d 714, 719 (2d Cir. 1962), *rev'd on other grounds*, 373 U.S. 341 (1963).

duct in violation of Rule 345.17 of the Exchange prohibiting registered representatives from guaranteeing any customer against loss in his account or receiving a share in the profits or sharing in the losses of a customer's account, held actionable); *SEC* v. *First Securities Co. of Chicago*, 463 F.2d 981 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972) (violation of NASD rule protecting public gives rise to private damage action). *Cf. Landy* v. *Federal Deposit Insurance Corp.*, 486 F.2d 139, 164-66 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

It would also run contrary to a position we find inviting, that to the American investing public listing on the New York Stock Exchange carries with it implicit guarantees of trustworthiness. The public generally understands that a company must meet certain qualifications of financial stability, prestige, and fair disclosure, in order to be accepted for that listing, which is in turn so helpful to the sale of the company's securities. Similarly it is held out to the investing public that by dealing in securities listed on the New York Stock Exchange the investor will be dealt with fairly and pursuant to law. This would be particularly true as to the convertible securities market which differs from the market for other corporate debt in that it is composed primiraly of individuals. *See* 1A Dewing, The Financial Policy of Corporations 268-71 (5th ed. 1953).[15] Some investors miss the notices of redemption

15 The aggregate amount of convertible bonds outstanding of companies listed on the New York Stock Exchange in March of 1963, according to Standard & Poor's Earnings and Rating Bond Guide, was $2,300,000,000, of those listed on the American Stock Exchange $92,000,000, and of unlisted companies $880,000,000. *See* 2 Report of Special Study of Securities Markets made pursuant to Section 19(d) of Securities Exchange Act of 1934 at 23. The Commission is well aware that individual shareholders to whom rights to subscribe to debentures are distributed by the corporations have no control over the time of distribution or whether there should be a distribution. Hence they are "participating in the market involuntarily, so to speak . . . ." *Id.* at 24.

and of expiration of conversion rights, while others "do not know that they should look for them." Note, 54 Cornell L. Rev. at 274 n.16.[16]

Appellees argue, however, that the self-regulation system of the 1934 Act applies in its terms only to Exchange *members*, as opposed to *issuers*, and that the legislative history indicated congressional intention not to extend coverage of the Exchange rules and regulations to issuers. In this connection appellees maintain that Congress did consider such an extension as evidenced by a proposed § 12(b)(1) to the Securities Exchange Act quoted in Cong. Rec. 8584 (1934), which was never adopted. *Id.* at 8586. The provision, however, was to require listed companies to agree with the Exchange to comply with the Exchange Act and the Commission's rules and regulations, and much of the debate related to whether the provision was necessary at all since such companies would have to comply with the law regardless of any such agreement.[17] Omitting the section

16 Cases involving generally broad standards of conduct and having nothing to do with disclosure, *see, e.g., Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified on other grounds*, 430 F.2d 1202 (9th Cir. 1970), require the presence of fraud to create a right of action under federal law, but this is because the only action or conduct proscribed by the rule is fraudulent conduct. Here, however, is involved a notice or notification rule.

17 Senator Hastings made the following statement in connection with the legislation:

> I do not quite understand why they want to get the issuer of the security on record, in the form of an agreement, not to violate a particular law, because it must be admitted that, if the law itself is valid, and if the rules and regulations made by the commission are valid, and the person entering into the agreement has brought himself within the law by offering his securities for sale, then certainly, it seems to me, the point of compelling him to sign a paper that he will abide by the laws and rules made by the commission must have back of it something which those of us who studied the bill do not quite understand.

78 Cong. Rec. at 8585 (1934). While Senator Hastings' amendment was defeated, the language he objected to was deleted in conference.

in question would apparently indicate merely a recognition that the provision was unnecessary. The legislative history is thus at most equivocal on the question whether Congress intended to insulate issuers from liability in the event that they violated an Exchange rule.[18]

Appellees argue also that the Exchange's remedies are limited to delisting. *See* Report of Special Study of Security Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., 1st Sess., Pt. IV, ch. XII at 566-67; *Intercontinental Industries, Inc.* v. *American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972) (permitting delisting). But no authority holds that the exclusive remedy against a listed company is delisting. The claim for relief is sufficient for jurisdictional purposes in any event.[19]

18 Provisions of the Listing Agreement requiring the corporation to, *e.g.*, "promptly notify the Exchange of any changes of officers or directors," Part I, 2, would not seem to give rise in any event to a liability to a securities holder. The provisions of the Listing Agreement here in question, however, were to "afford the holders of its securities listed on the Exchange a proper period within which . . . to exercise their rights . . . ."

19 *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 724 (1966). *See Hudak* v. *Economic Research Analysts, Inc.*, 499 F.2d 996, 1001 (5th Cir. 1974); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123, 129 (7th Cir. 1972). The writer of the opinion for himself alone would hold that even if there were such a duty it would be essentially coterminus with a contractual duty to the appellants as third party beneficiaries. As he views it, the limited notification provisions of the Indenture and debenture were modified by virtue of the application for listing on the stock exchange, which specifically incorporated by reference the Listing Agreement of November 5, 1957, to which we have so frequently alluded. *See Lawrence* v. *Fox*, 20 N.Y. 268 (1859); *Seaver* v. *Ransom*, 224 N.Y. 233, 120 N.E. 639 (1918); *Weinberger* v. *NYSE*, 335 F. Supp. 139 (S.D.N.Y. 1971). The duty of a listed company to its own securities holders to treat them fairly is founded in fundamental concepts of the law pertaining to corporate fiduciaries. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Pepper* v. *Litton*, 308 U.S. 295 (1939); *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973). Security holders of a

THE INADEQUACY OF THE BOEING NOTICE

The notice Boeing gave, we hold, had two deficiencies. First, Boeing did not adequately apprise the debenture holders what notice would be given of a redemption call. Investors were not informed by the prospectus or by the debentures that they could receive mail notice by registering their debentures, and that otherwise they would have to rely primarily on finding one of the scheduled advertisements in the newspaper or on keeping a constant eye on the bond tables. Second, the newspaper notice given by Boeing was itself inadequate.

The first factor we think highly significant. Many of the debenture holders might well have decided to register their bonds, had the significance of registration, or of the failure to register, been brought home in the materials generally available to the purchasers of the debentures. No detailed information as to notice was given on the face of the debentures, even in the fine print. The debentures stated simply:

> The debentures are subject to redemption, as a whole or in part, at any time or times, at the option of the Company, in not less than 30 nor more than 90 days' prior notice, as provided in the Indenture . . .

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corporation are in a very real sense creditor beneficiaries, *see* 1 Restatement of Contracts § 136 (1932), to whom an underlying duty of fair treatment is owed by the corporation or majority stockholders or controlling directors and officers thereof. While it may be said that the Indenture itself is a contract, *Kaplan* v. *Fornado, Inc.*, 341 F. Supp. 212 (N.D. Ill. 1971); *Buchman* v. *American Foam Rubber Corp.*, 250 F. Supp. 60 (S.D.N.Y. 1965), it was clearly entered into with listing on the NYSE in mind and was substantially simultaneous in execution and coordinate in operation with the listing application. On this basis it would be unnecessary in the writer's view to reach the ground upon which the court relies, but since this view is individual only, he joins in the ground for decision taken.

There was no indication that registration would mean that a debenture holder would receive mail notice. Nor was there any indication of the extent of newspaper notice to be provided—either as to the papers that would be used or how often the notice would be published. Debenture holders were simply referred by the debenture, as well as by the prospectus, to the 113-page Indenture Agreement, which, to be sure, was available to debenture holders or prospective purchasers upon request, but which was not circulated generally with the warrants or debentures.

We have dwelt at length in the facts on the newspaper notice actually given. While it may have conformed to the requirements of the Indenture it was simply insufficient to give fair and reasonable notice to the debenture holders.

The duty of reasonable notice arises out of the contract between Boeing and the debenture holders, pursuant to which Boeing was exercising its right to redeem the debentures. An issuer of debentures has a duty to give adequate notice either on the face of the debentures, *Abramson* v. *Burroughs Corp.*, CCH Fed. Sec. L. Rep. [1971-72 transfer binder] ¶ 93,456 (S.D.N.Y. 1972) (Lumbard, *C.J.*, sitting by designation), or in some other way, of the notice to be provided in the event the company decides to redeem the debentures. Absent such advice as to the specific notice agreed upon by the issuer and the trustee for the debenture holders, the debenture holders' reasonable expectations as to notice should be protected.

For less sophisticated investors (it will be recalled that warrants for the purchase of debentures were issued to *all* Boeing shareholders), putting the notice provisions only in the 113-page Indenture Agreement was effectively no notice at all. It was not reasonable for Boeing to expect these investors to send off for, and then to read under-

standingly, the 113-page Indenture Agreement referred to in both the prospectus and the debentures themselves in order to find out what notice would be provided in the event of redemption.

Boeing could very easily have run more than two advertisements in a single paper prior to the eleventh hour (March 28), at which time it issued its belated news release and advertised for the third time in the Wall Street Journal and for the first time in the New York Times. Moreover, in the same period that the debentures were in the process of being redeemed, Boeing was preparing for its annual meeting (to be held April 24). Proxy materials were being prepared throughout March and were finally mailed sometime between March 24 and March 30. Management could readily have arranged the redemption dates and the proxy mailing so that notice of the redemption dates could have been included in the envelope with the proxy materials. Thus at no extra cost except that of printing brief notices, at least all Boeing shareholders would have received mail notice, and presumably a significant number of the plaintiff class owned Boeing common stock, as well as debentures, in 1966. Had Boeing attempted such mail notice, or mail notice to original subscribers, and also given further newspaper publicity either by appropriate news releases or advertising earlier in the redemption period, we would have a different case and reasonable and sufficient notice might well be found.

Nothing that we have said is inconsistent with either *Abramson* v. *Burroughs Corp., supra,* or with *Kaplan* v. *Vornado, Inc., supra.* These cases are distinguishable on their facts as well as in respect to the legal arguments made.

In *Abramson* the court was presented with the claim that Rule 10b-5 was violated in connection with the sale

of certain convertible debentures. As here, a nonconverting debenture holder was suing for the amounts lost when he failed to convert before the expiration of the conversion period and he challenged the notice procedures in connection with the redemption. In *Abramson,* however, the principal contention was that there were material omissions in the *prospectus* issued in connection with the sale of the debentures. Abramson alleged that the notice provisions in the prospectus were misleading in that they omitted the nature and frequency of notice that bondholders would receive.

Judge Lumbard in *Abramson* found quite to the contrary that the face of the debentures—unlike those here—stated exactly what notice would be provided, notice which incidentally was at least twice that required here, making specific reference to publication once a week for four weeks in a newspaper of general circulation in New York and one in Detroit. Thus the Burroughs debentures in *Abramson* specifically informed the investor where and how often notice of redemption would be published so that he could make a reasonable evaluation of the likelihood that he would receive such notice or take steps to increase the chances that he would see it either by subscribing to the Wall Street Journal or the like, by contacting a broker to handle the matter for him, or by registration.[20]

The notice provisions in *Abramson* were minimal but sufficient to clear judicial approval; the notice here was

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20 In *Abramson,* moreover, the court emphasized that the debentures in issue specifically stated on their face that the bonds could be registered, and if registered that notice of a call would be provided to registered holders by mail. The court therefore concluded that the nonconverting debenture holders had themselves to blame for not receiving notice. Here, there was no such explicit information on the Boeing debentures. While the debentures did state that they could be registered, as we have said, there was no indication that registration would protect the investor by providing him with notice by mail.

significantly less. Moreover, the Boeing debentures themselves were somewhat misleading. While they indicated that redemption could be made on not less than 30 days' notice, one would have had to have been, if not a lawyer, at least an experienced and knowledgeable investor, to read the fine print two paragraphs previously which said that the conversion right ran only "to and including but not after the tenth day prior to the redemption date . . . ."

In *Kaplan* v. *Vornado, Inc., supra,* where the percentage of nonredeeming debenture holders was under 3 per cent as opposed to the 7 per cent here, in addition to notices published in the New York Times in accordance with the indenture agreement there was a press release *prior* thereto which resulted in publications of the announcement of redemption in the Wall Street Journal, Women's Wear Daily, Daily News Record, Homes Furnishing Daily, and on the Reuters and Dow-Jones wire services. The court in *Kaplan* specifically found that "the essential facts of the defendant's redemption and of the termination of the holders' conversion rights were printed in these news items." 341 F. Supp. at 213.[21]

What one buys when purchasing a convertible debenture in addition to the debt obligation of the company incurred thereby is principally the expectation that the stock will increase sufficiently in value that the conversion right will make the debenture worth more than the debt. The debenture holder relies on the opportunity to make a proper conversion on due notice. Any loss occurring to him from failure to convert, as here, is not from a risk inherent in his investment but rather from unsatisfactory notification procedures. *See* Note, 54 Cornell L. Rev. at

21 The writer would note that in *Kaplan* the company did indeed comply with the NYSE Listing Agreement-Company Manual requirement of a general news release at the start of the redemption.

271. *See also* Miller, *How to Call Your Convertibles,* Harv. Bus. Rev. 66, May/June 1971.[22] The debenture holder's expectancy is that he will receive reasonable notice and it is his reliance on this expectancy that the courts will protect. *See generally* Fuller & Perdue, *The Reliance Interest in Contract Damages,* 46 Yale L.J. 52, 373 (1936-37). *See, e.g., Associated Perfumers, Inc.* v. *Andelman,* 316 Mass. 176, 55 N.E.2d 209 (1944). *See also Schlick* v. *Penn-Dixie Cement Corp.,* 507 F.2d 374 (2d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3611 (U.S. May 19, 1975). Had there been proper publication, a reasonable investor undoubtedly would have taken action to prevent the loss occurring to him.

Of course, it may be suggested that the appellee corporation itself was not the beneficiary of the appellants' loss; rather, the corporate stockholders benefited by not having their stock watered down by the number of shares necessary to convert appellants' debentures. But an award against Boeing will in effect tend to reduce *pro tanto* the equity of shareholders in the corporation and thus to a large extent those who were benefited, one might almost say unjustly enriched, will be the ones who pay appellants' loss.[23]

22 Obviously, where a conversion is not made there may be costs to the company itself which unnecessarily has to make redemption payouts. Miller, Harv. Bus. Rev. at 67. Miller goes on to say that "newspapers have *not* proved an effective conduit, and because of this the corporate officer must concentrate on the mailing approach." Perhaps one solution to the overall problem would be the English one, whereby the convertible debenture is considered converted once the total principal amount of the issue outstanding is less than 25 per cent of its original size. *Id.* at 70.

23 On the remand for a determination of damages, it might be appropriate for the district court to allow Boeing to meet the liability resulting from this case by issuing stock. That is what the plaintiffs would have had if they had received notice of the redemption call, and one of the purposes of the redemption was to enable the company

On the foregoing basis it is unnecessary for us to determine whether there is any cause of action under the Trust Indenture Act, 15 U.S.C. § 77bbb, as appellants contend. Nor, because appellants would not have standing to assert it, do we ground liability upon or make reference in the context of liability to appellants' argument that the call was illegal in the first instance because it was based upon an improper conversion rate.

DAMAGES AND THE "CONVERSION RATE"

We must, however, in remanding to the district court for a determination of damages, take note of the conversion rate argument which was rejected by the court below. That argument was essentially that the 4 per cent stock dividend declared in November, 1958, the 2 per cent stock dividend declared in November, 1959, and the acquisition by Boeing on March 31, 1960, of substantially all the assets of Vertol Aircraft Corp. necessitated an adjustment in the conversion rate of two shares of Boeing stock for each $100 of debentures in accordance with Section 4.05 of the Indenture.[24] At all times after these three transactions, Boeing treated the conversion rate as 2.0448. Because that rate was under 2.045, no adjustment was required under the Indenture § 4.05(f), which provided in part that

> Whenever the amount by which the conversion rate would be changed in accordance with the foregoing provisions of this Section 4.05 is less than one-twentieth of a share of Capital Stock the Company at its option need not make such adjustment at that time.

to exchange debt for equity capital. It would thus seem appropriate for Boeing to be able to issue stock to meet all or part of this liability, with, of course, the shares being valued according to their market value at date of issuance.

24 The section is four printed pages long and therefore will not be reprinted here in its entirety.

Appellants on the other hand contend that the proper conversion rate was at least 2.045 or as high as 2.08.

On November 4, 1958, Boeing declared a 4 per cent stock dividend and issued 281,537 shares therefor. Section 4.05(b)iv states that in the case of shares so issued the consideration therefor shall be "deemed to be the number of shares so issued multiplied by the market value thereof."[25] Boeing initially calculated the market value by including the stock dividend shares in the number of shares outstanding to obtain the market value of the post dividend stock, *i.e.*, by dividing the closing price of the stock on November 4 of $56.875 by 1.04 since there were 104 shares where there had been 100. This resulted in a market value figure rounded off to $54.75 which, multiplied by the number of stock dividend shares issued, gave a total consideration therefor of $15,414,151.[26] On this basis the calculated rate was 1.9927 but since the indenture required that the conversion rate not be below 2.00, note

25 Market value in connection with a limited stock dividend is defined in Section 1.01 as follows:

> For the purposes of this definition market value shall mean the last reported sale price of the Capital Stock of the New York Stock Exchange (or if not listed on the New York Stock Exchange, then on any national securities exchange where listed) on the date of declaration of each stock dividend involved or, if there shall not have been a sale on such date, on the basis of the average of the bid and asked quotations therefor on said exchange on such date, or if the Capital Stock shall not then be listed on any national securities exchange, on the basis of the average of the bid and asked quotations in the over-the-counter market on such date.

26 That consideration and the number of shares issued were to be added to the initial consideration of $351,872,350 and 7,037,447 (valued at $50 per share) shares. Under the basic conversion rate formula the product of $100 and the number of resulting shares is divided by the aggregate consideration. "The resulting quotient, adjusted to the nearest one-hundredth, shall thereafter be the conversion rate (until further adjusted) if it is greater than the basic conversion rate [of 2.00 shares for each $100 debenture]." Sec. 4.05(a). But if the adjusted rate is *less* than 2.00 the basic conversion rate of 2.00 governs.

26 *supra*, the rate remained at 2.00. Appellants agree that the rate should be 2.00 but contend that the consideration for the stock dividend shares should be treated as at $14,076,850, the figure which would result from a flat 2.00 or $50 per share rate (above which stock dividend shares could not be valued under the limitations of Section 4.05(a), note 26 *supra*).

Initially the 2 per cent stock dividend of 147,489 shares on November 2, 1959, was treated by Boeing in the same way as the previous year's dividend. The November 2, 1959, closing price of $30.375 per share was divided by 1.02 to obtain a quotient of $29.77 which, multiplied by the number of shares (147,489), gave additional consideration of $4,390,748 to be added to the aggregate consideration (under Section 4.05(b))[27] after the prior stock dividend.

The gist of appellants' complaint about the conversion rate is that in connection with the acquisition of Vertol Aircraft assets in 1960 for 472,736 shares of Boeing, not only were the Vertol assets overevaluated and evaluated at the wrong time so as to obtain the highest evaluation, but the prior stock dividend adjustments were recomputed to the debenture holders' disadvantage. The argument is that all this was done having the conversion rate precisely in mind and with the purpose of keeping it at 2.044999 or below so as to avoid adjustment. (See Exhibit 28.)

The recomputation of the stock dividend adjustments was as follows. The full share price of $56.875 at the close of the 1958 dividend day was taken, that is, the stock dividend shares were not included in the number of shares outstanding. Thus the consideration received was calculated at $16,012,417 (281,537 x 56.875) rather than

27 Appellants overlook the aggregate aspect of Section 4.05(b).

the $15,414,151 previously used. The same was done in connection with the 1959 2 per cent stock dividend, resulting in increased consideration of $4,479,979 rather than the $4,390,748 previously used. Appellants urge that Boeing thereby "added" consideration received of $1,935,-567 from the 1958 dividend (because appellants would treat that as $14,075,850) and $87,843 from the 1959 dividend, thus leaving at the end of this recomputation a conversion rate of 2.0052 rather than one of 2.0161. But the lower court found, and we agree, that while appellants' computations, or at least Boeing's original ones, better represent the economic realities and more accurately follow general accounting practice, there was discretion in the Board under Section 1.01, note 25 *supra*, not to include the dividend shares in computing the market value.

In connection with the Vertol acquisition, the value placed on it for purposes of determination of the conversion rate was the market value of the Boeing stock on November 13, 1959, at 33⅝, for a total of $15,895,748. Appellants argue that three different valuations would have been more accurate and fairer: the valuation on March 31, 1960, of the Vertol assets as recorded on the Boeing books at $12,435,138.47; that on January 18, 1960, when the contract of acquisition was signed and the Boeing stock worth 30⅝; or that on March 30, 1960, when the contract was closed and the Boeing stock worth 24⅛. Any one of these valuation measures would have increased the conversion ratio to over 2.045. But Section 4.05(b)(2) of the Indenture provided that "in the case of the issuance of shares for consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as determined by the board of directors." The district court's finding was that there was no evidence that Boeing "had any purpose of delib-

erately hurting its debenture holders" and that while it was true that on November 13, 1959, the acquisition was still tentative, the board of directors had a colorable right to fix the fair value of the consideration as of November 13, 1959. That decision was one made, the court below found, in good faith and with the approval of accountants, auditors, investment bankers and counsel. Consequently, the court found that the decision was not subject to attack. *See Morris* v. *Standard Gas & Electric Co.*, 31 Del. Ch. 20, 63 A.2d 577 (1949). We do not believe the trial court's findings clearly erroneous. On those findings the conclusion of law was correct. In short, we affirm so much of the trial court's opinion as relates to the conversion rate.

Judgment affirmed in part; reversed and remanded in part.

APPENDIX F

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 1820

WILLIAM R. VAN GEMERT, *et al.*,

Plaintiffs,

—v.—

THE BOEING COMPANY
(formerly BOEING AIRPLANE COMPANY), *et al.*,

Defendants.

Plaintiffs' counsel in these consolidated class actions have moved for an award of attorneys' fees. These actions were filed in 1966 by non-converting holders of certain subordinated debentures of the Boeing Company. The gravamen of the complaints is that plaintiffs and other class members had inadequate and unreasonable notice of Boeing's intention to "call" the convertible debentures, in question, and were unable to exercise their conversion rights before the deadline.

In November 1973, after trial, I rendered a decision dismissing the action and entering judgment for defendants. On July 14, 1975, the Court of Appeals held that the notice of redemption was deficient and constituted a violation of the securities laws. *Van Gemert* v. *Boeing,* 520 F2d 1375 (2d Cir. 1975).

On June 30, 1977, this court signed a judgment in favor of plaintiffs in the amount of $5,749,005.83. On or about July 20, 1977, Boeing deposited, pursuant to the judgment, $5,749,990.83, which with interest has grown today to more than $6,000,000.00.

The Judgment provided that plaintiffs' counsel would be awarded fees and expenses from the total amount of the judgment. Boeing appealed this portion of the judgment, and on March 27, 1978 the Court of Appeals issued an opinion holding that attorneys' fees and expenses may not be paid from any amount of the judgment which is not claimed by absent class members. The decision of the Court of Appeals states that the payment of attorneys' fees and expenses must be deferred until after all the proofs of claims have been processed.

After entry of the judgment and before the Court of Appeals' decision of March 27, 1978, plaintiffs' attorneys filed extensive fee applications. I have reviewed those applications and am familiar with the excellent quality of the work performed by plaintiffs' counsel. Plaintiffs' counsel have made new law and have been involved in a trial on the merits and three appeals to the Court of Appeals. They have not received any remuneration for their services to date in the nearly twelve years that this litigation has lasted. They deserve to be well compensated.

Nevertheless, in light of the Court of Appeals' recent opinion, it would be premature for me to make a fee award at this time.

The Special Master is in the process of attempting to locate class members. This is complicated by the fact that the debentures in question were "bearer" bonds.

After all claims have been finally determined, I will issue an award to plaintiffs' attorneys taking into consideration the quality of their work and the length of time that this litigation has lasted.*

So Ordered.

/s/ Sylvester J. Ryan
United States District Judge

Dated: New York, New York
May 11, 1978

* The Court also has in mind the fact that interest is accruing on the settlement fund. Because of the delay in paying attorneys' fees, I will consider at the time the fees are set whether the interest on that portion allotted to fees should also be paid to the attorneys.

APPENDIX G

Chronological List of Relevant Docket Entries

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 1820

DATE	PROCEEDINGS
6-23-66	Filed complaint and issued summons.
7- 7-66	Filed summons & ret—Served Boeing Co. 6-24-66 —Chase Manhattan Bk. 6-27-66—Unable to find Artemus S. Gates—Served Thomas R. Wilcox 6-24-66.
7-15-66	Filed stip & order extending deft's time to ans to 8-12-66—Tyler,
7-15-66	Filed ANSWER of deft. Boeing Co.
7-19-66	Filed pltff's notice to take deposition of the following defts. T.R. Wilcox, Boeing Co. & the Chase Manhattan Bank.
7-20-66	Filed defts. notice of motion for appointment of Rule 2 Judge.
7-20-66	Filed Memo Endorsed on motion of 7-20-66. After hearing, this motion is denied without prejudice to renewal when the shortage of judicial manpower in this district is relieved. So ordered, Ryan, Ch.J.
7-28-66	Filed stip. & order adjourning the time of defts. Boeing Co, Wilcox & Chase Man. depositions to 9-20-66 Palmieri, J.
8-10-66	Filed stip. & order—extending deft. (Chase Manhattan Bk) to answer to 9-15-66—Tenney, J.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
8-15-66	Filed order—ordered that an explanatory note, in the form annexed hereto, be included with the notice to be sent by direct mailing as prescribed in the third ordering paragraph of the order to show cause herein dated 7-21-66 Ryan, Ch. J. m/n
8-29-66	Filed defts' (Boeing, etano) notice of mailing re: supplemental list of debenture holders.
9- 6-66	Filed affdvt. of service on persons in charge (filed in court).
9- 6-66	Filed affdvt. of Robert F. Dobbin (filed in court).
9-12-66	Filed stip & order extending deft's (Chase Manhattan) time to answer to 10-18-66—Levet, J.
9-13-66	Filed notice of appearance for Marian S. Mitchell.
9-23-66	Filed stip. & order adjourning depositions to 10-20-66—Bryan, J.
9-27-66	Filed affdvt. of S. Hazard Gillespie.
9-27-66	Filed special appearance by Henry J. Hoff to object to his inclusion in a class represented by pltffs.
9-27-66	Filed defts' (Boeing & Wilcox) affdvt. & show cause order to determine action to be maintained as a class action, etc.—before Judge Ryan 3-29-66 —Room 129.
9-27-66	Filed memo endorsed on show cause order filed 9-27-66—This application is granted; see opinion filed herewith; submit order—Ryan, J.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
9-27-66	Filed memorandum of pltffs. in support of motion for preliminary injunction.
9-27-66	Filed memorandum of defts. in opposition to motion for preliminary injunction.
9-27-66	Filed pltffs' affdvt. & notice of motion for a preliminary injunction—ret. before Ryan, J.—9-19-66—rm. 129.
9-27-66	Filed affdvt. of Everett I. Willis.
9-27-66	Filed memo endorsed on pltffs' motion for preliminary injunction filed 9-27-66—Motion denied; So ordered—Ryan, J.—mailed notice.
9-27-66	Filed affdvt. of S. Hazard Gillespie in opposition.
9-27-66	Filed transcript of record of proceedings of 9-19-66.
9-27-66	Filed Opinion # 32,776—motion to determine action as a class action is granted and that all the actions pending in this court should be consolidated. Let an appropriate order be submitted granting the relief sought—Ryan, J.
9-28-66	Filed application of Abraham Freedman that counsel in the Philadelphia action be permitted to participate in the within proceeding pending the formal transfer of the proceeding from Philadelphia to N.Y.
9-28-66	Filed memo endorsed—application to participate granted—So Ordered—Ryan, Ch.J.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
9-28-66	Filed petitioner's notice of motion for leave to appear & to extend time to file pleadings.
9-28-66	Filed memo endorsed—motion to intervene as party pltff is granted—J. Weil is permitted to appear for J. Weil & S. Weil within 30 days designates an atty within this Dist.—So Ordered —Ryan, J.
9-28-66	Filed pltff's notice of motion to consolidate action of Jack Diener with 66-1820.
9-28-66	Filed memo endorsed—motion to consolidate action transferred from Dist. of Columbia with 66-1820 is granted—B. Gordon & M. Miller—firm of Danzansky & Dickey of Wash., D.C. are permitted to appear as atty for Jack Diener in the consolidated action provided within 30 days they designate an atty with offices in this Dist.—So Ordered—Ryan, J.
9-28-66	Filed pltff's affidvt & notice of motion to amend complaint ret 9-6-66.
9-28-66	Filed memo endorsed—no opposition to amending complaint—motion granted—So Ordered—Ryan, J.
9-28-66	Filed pltff's affdvt & notice of motion to consolidate ret 9-6-66.
9-28-66	Filed memo endorsed—application for consolidation is granted—settle order on notice further & additional provisions will be made later Re: proceedings etc. So Ordered—Ryan, J.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
10- 4-66	Filed order consolidating this action with 6 other actions for all pretrial proceedings and for trial purposes and the present & former debenture-holders be permitted to intervene and come into this consolidated action as pty. pltffs.—& caption be deemed amended to include their names—Ryan, J.
10- 4-66	Filed order that a pretrial conference in each of the consolidated actions shall be held on 10-25-66 —at 2:00 p.m. in Room 3001—Ryan, J.
10-14-66	Filed amended complaint.
10-17-66	Filed statement of James I. McClintock as counsel.
10-17-66	Filed memo endorsed on statement of counsel—The within application of James I. McClintock is granted—said counsel be permitted to appear as an atty. in this & related consolidated action; he has designated Mendel Lurie as the person within this district to receive service of papers on his behalf in this action—So ordered—Ryan,J.
10-18-66	Filed notice of appearance for Vincente J. Bonnard.
10-18-66	Filed affdvt. & notice of motion of Chase Manhattan Bank to dismiss amended complaint—ret. before Ryan, J.—10-27-66—room 3001.
10-18-66	Filed memorandum in support of motion by Chase Manhattan Bank.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
10-25-66	Filed stip. & order extending time for deft. Chase Manhattan Bank to answer amended complaint to 11-17-66—MacMahon, J.
10-25-66	Before Ryan, J.—pre-trial hearing.
10-26-66	Filed pltffs' (Van Gemert) affdvt. & notice of motion to appoint Gen'l counsel ret. before Ryan, J.
10-26-66	Filed memo endorsed on motion filed 10-26-66—Motion withdrawn without prejudice, Ryan, J.
10-31-66	Filed pre-trial order # 1-actions consolidated to bear No. 66-1820—the consolidated amended complaint shall be filed & served on or before 11-21-66—defts' answers or motions as to the consolidated amended complaint shall be filed & served on or before 12-12-66—etc.—Ryan, J.
10-31-66	Filed affdvt. of Everett I. Willis.
11- 1-66	Filed copy of pre-trial order # 1.
11-21-66	Filed stip & order extending pltffs' Committee to file a consolidated amended complaint to 11-28-66—Ryan, J.
11-29-66	Filed stip & order extending time of pltffs' to serve a consolidated complaint to 12-5-66—Ryan, J.
12- 2-66	Filed stip & order extending pltffs' time to file a consolidated amended complaint to 12-19-66—Ryan, J.
12-19-66	Filed consolidated complaint.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
12-29-66	Filed affdvt. of Abraham E. Freedman in rebuttal to reply affdvt. of Chase Manhattan Bank.
12-29-66	Filed affdvt. of Stuart D. Wechsler.
12-29-66	Filed reply affdvt. of Everett I. Willis.
12-29-66	Filed affdvt. of S. Edward Mittler in opposition to motion for dismissal of amended complaint.
12-29-66	Filed supplemental affdvt. of Everett I. Willis.
12-29-66	Filed transcript of record of proceedings of 10-27-66.
12-29-66	Filed memo endorsed on motion of deft. Chase Manhattan Bank filed 10-18-66—The Clerk is directed to enter judgment forthwith dismissing the complaint for lack of jurisdiction against deft. The Chase Manhattan Bank. So ordered—Ryan, J.
1- 3-67	Filed Judgment—ordered, adjudged and decreed: that the Count XII of the consolidated complaint be stricken, and that the defendant, The Chase Manhattan Bank have judgment against the plaintiffs dismissing the action as to it.—Ryan, J.—judgment entered—Clerk mailed notice ent 1-3-67.
1-11-67	Filed ANSWER of deft's The Boeing Co. & Thomas R. Wilcox.
1-18-67	Filed pltffs' demand for jury trial.
1-30-67	Filed pltff's Committee joint list of documents to be produced by deft Boeing.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
1-30-67	Filed stip. & order extending defts' time to object to in whole or in part re: jury demand to & including such time as shall be specified by the court at or as a result of the pretrial hearing ordered to be held by paragraph 11 of pretrial order No. 1 entered 10-31-66—Ryan, J.
1-30-67	Filed stip. & order extending time for pltffs. to serve a joint list of documents to be produced to 1-30-67—on or before 2-20-67 defts. shall produce for inspection so much of pltffs' joint list of documents as to which they have no objection—Ryan, J.
2-20-67	Filed stip & order extending time for deft Boeing to produce for inspection documents indicated to 3-6-67—McLean, J.
3-10-67	Filed stip & order extending time for deft' Boeing to produce for inspection documents indicated to 3-20-67—all papers in answer to objections shall be served on or before 3-27-67—Metzner, J.
3-29-67	Filed stip & order extending time for deft' Boeing to produce for inspection documents indicated to 4-3-67—all papers in answer to objections shall be served on or before 4-10-67—Bryan, J.
7-28-67	Filed transcript of record of proceedings of 9-6-66.
7-28-67	Filed transcript of record of proceedings of 9-19-66.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
7-28-67	Filed transcript of record of proceedings of 9-26-66.
7-28-67	Filed transcript of record of proceedings of 10-4-66.
7-28-67	Filed transcript of record of proceedings of 10-25-66.
7-28-67	Filed transcript of record of proceedings of 10-27-66.
7-28-67	Filed transcript of record of proceedings of 10-31-66.
12- 7-67	Filed written interrogs served by pltffs' on defts.
1- 3-68	Filed notice of change of firm name of deft's Boeing Co. & T.R. Wilcox attorneys.
2-14-68	Filed Answers of Defts the Boeing Co. and Thomas R. Wilcox to Written Interrogs served by Pltffs on Defts.
7- 5-68	File appearance of Edward A. Pagels.
1-10-69	Filed notice to take deposition by pltff's of H.W. Haynes—1-23-69 and H.F. Olsen—1-24-69.
4- 8-69	Filed notice by pltff's to take deposition of H.W. Hayes & H.F. Olson on 4-9-10-11-69.
5-16-69	Filed defts' interrogs.
6-26-69	Filed s/ pltffs affdvt & Notice of motion to vacate dismissal in 67 C 1053 and consolidate this action with 67 C 1053, ret: 6/24/69 before Sugarman Ch.J.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
6-26-69	Filed affdvt. of Irving Steinman re: consolidation.
6-27-69	Filed order that action is hereby referred to Judge Ryan, for all purposes. Sugarman, CH.J.
6-30-69	Filed 2nd memo. Endorsed on pltff's motion filed 6-26-69: I have been designated as Rule 2 judge in these actions. Both actions present common questions of fact, and they are consolidated. So ordered. Ryan, J.
7- 1-69	Filed deft's (Boeing Co. & T.R. Wilcox) demand that pltff's furnish names & addresses of its principal officers.
11- 3-69	Filed pltff's answers to deft's interrogs.
6- 5-70	Filed Pltff's motion for an order setting a date for trial of this action.
8- 6-71	Filed Stipulation & order of statement as to certain facts & what certain witnesses would testify to if called at trial as indicated. So ordered-Ryan, J.
2-16-72	Filed ORDER that on or before 2-18-72 all requests for admission by either pltffs or defts under R. 36 FRCP shall be served, filed with the Clerk of this Court and delivered to Chambers of Ryan J. On or before 3-3-72 all responses to any requests for admission shall be served, filed with the Clerk of this Court and delivered to Ryan J. On or before 3-15-72 pltffs shall serve their brief or briefs, file copies with the Clerk of this Court and deliver copies to Ryan J. On or before 5-1-72 defts will serve & file with Clerk

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DATE	PROCEEDINGS
	& deliver to Ryan J. certain affdvs, briefs etc. and on or before 6-1-72 the pltffs shall serve, file with Clerk & deliver to Ryan J. Lists, briefs as indicated. After the Court has had an opportunity to consider the parties' briefs and related papers a date will be fixed for a pre-trial conference. Ryan J. m/n
2-18-72	Filed Defts' request for admissions pursuant to R. 36 FRCP.
3- 3-72	Filed Pltffs' admissions pursuant to R. 36 FRCP.
3- 3-72	Filed Defts' response to pltffs' request for admissions. (Defts Boeing Co. & Thomas R Wilcox)
3-10-72	Filed Pltffs' motion for an order directing that pltffs' requests for admissions are admitted or in the alternative that deft be ordered to serve amended answers or that a hearing be held. Ret. 3-20-72.
3-15-72	Filed pltffs' Brief in favor of judgment.
4-13-72	Filed Transcript of record of proceedings, dated 2-4-62.
5-15-72	Filed Defts' statement pursuant to Rule 9 (g).
5-15-72	Filed Defts' List of witnesses and exhibits.
5-15-72	Filed Defts The Boeing Co. and T.R. Wilcox's proposed pre-trial order.
5-15-72	Filed Defts' memorandum prior to trial.
5-31-72	Filed Transcript of Record of Proceedings dated 2/4/72.

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DATE	PROCEEDINGS
6-19-72	Filed Pltffs' reply supple, trial memorandum.
11- 8-72	Filed defts' Supplemental Memorandum Prior to Trial.
11-15-72	Before; Judge Ryan, Non-Jury Trial Begun.
11-16-72	Trial Continued.
11-17-72	Trial " .
11-20-72	Trial continues and concluded—Decision Reserved. All proposed findings and conclusions and memorandum to be submitted by 1-12-73—All replies and responses be submitted by 1-24-73.
1-12-73	Filed Dfts. Memorandum Re Proposed Findings of Fact & Conclusions of Law.
1-12-73	Filed Dfts. Proposed Findings of Fact & Conclusions of Law.
1-12-73	Filed Pltffs. Proposed Findings of Fact.
1-26-73	Filed Pltffs. Comments on Dfts. Proposed Findings.
2-70-73	Filed Transcript of proceedings dated 11/15/72, 11/16/72, 11/17/72.
11-29-73	Filed Opinion # 40067. The Clerk is directed forthwith to enter judgment for defts. dismissing the complaints in the following 10 actions, 66 Civ. 1820, 66 Civ. 2384, 66 Civ. 2385, 66 Civ. 2640, 66 Civ. 2786, 66 Civ. 3005, 66 Civ. 3054, 66 Civ. 3403, 67 Civ. 280, 67 Civ. 1053. Ryan J. (mailed notice)

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DATE	PROCEEDINGS
11-30-73	Filed Judgment. Ordered that defts. The Boeing Co. et al. have judgment against the pltffs. William R. Van Gemert, et al., dismissing the complaints in the following 10 actions, 66 Civ. 1820, 66 Civ. 2384, 66 Civ. 2385, 66 Civ. 2640, 66 Civ. 2786, 66 Civ. 3005, 66 Civ. 3054, 66 Civ. 3403, 67 Civ. 280, 67 Civ. 1053, on the merits with costs to be taxed. Clerk. (mailed notice)
12-26-73	Filed Pltffs. Notice of Appeal. (Edward Mittler) mailed notice. (re: jud. 11/30/73)
12-27-73	Filed Pltffs. Appellants Notice of Appeal. (mailed notice) (re: jud. 11/30/73)
12-27-73	Filed Notice of Appeal by Pltffs. From judgment entered 11/29/73 & final judgment entered 11/30/73. (mailed notice)
12-28-73	Filed Notice of appeal by plaintiffs from judgment entered 11/30/73. (mailed notice)
12-28-73	Filed Notice of appeal by plaintiffs from judgment entered 11/30/73. (mailed Notice)
12-27-73	Filed bond undertaking for costs on appeal (Bond No. J 8772 227) for the following Plaintiffs; Gemert, Henning, Houchins, Pearlman and Chariott. ($250.00 Bond.)
12-27-73	Filed Bond undertaking for costs on appeal (Bond No. J 2772 228) for the following plaintiffs; Gemert, Henning, Houchins, Pearlman and Chariott. ($250.00 Bond.)

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DATE	PROCEEDINGS
12-28-73	Filed Bond undertaking for cost on appeal (Bond No. J. 87 72 229) in favor of The Boeing Co. (Formerly Boeing Airplane Co.) et al. in the amount of $250.00.
1- 7-74	Filed Stip & Order that the Notice of Appeal dated 12/26/73 have agreed that Chase Manhattan Bank is not a deft. & was not a party of the judgment appealed from. The Chase Manhattan Bank is deleted from the Notice of appeal, etc. Ryan J.
1- 7-74	Filed Stip & Order that the Notice of Appeal dated 12/28/73 have agreed that Chase Manhattan is not a deft. & was not a party of the judgment appealed from. The Chase Manhattan Bank is deleted from the Notice of Appeal, etc. Ryan J.
1- 9-74	Filed Stip & Order that the Chase Manhattan Bank is not a deft & was not a party to the judgment appealed from The Chase Manhattan Bank & its attys are deleted from said Notice of Appeal, etc. Ryan J.
1-11-74	Filed Notice of Change of Address for Russell E. Gary, 1335 Lincoln Road, Miami Beach, Florida 33139.
1-25-74	Filed Memorandum in support of motion by Defts Boeing & Wilcox for order determining this action to be maintained as a class action.
1-25-74	Filed Pltff's memo in support of motion for summary judgment.

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DATE	PROCEEDINGS
1-25-74	Filed Pltff's post-trial memo of law with respect to Boeing's violation of Stock Exchange Rules.
1-25-74	Filed Pltff's reply supplemental Trial Memo.
1-25-74	Filed Pltff's memo in response to Deft's Post-Trial Papers.
1-25-74	Filed Notice of Motion by Kass, Goodkind, Wechsler & Gerstein.
1-25-74	Filed Pltff's Supplemental Trial Memo.
1-25-74	Filed Pltff's Proposed Findings of Fact & Etc.
1-25-74	Filed Pltff's List of Witnesses & Exhibits.
1-25-74	Filed Motion to require answering papers to motion for summary judgment.
1-25-74	Filed Motion to require answering papers to motion for summary judgment.
1-25-74	Filed Motion for a trial date by pltffs.
1-25-74	Filed request for admission of facts by Pltffs.
1-25-74	Filed Stip. with respect to Pltffs requests for admission of facts.
1-25-74	Filed Statement under Rule 9(g) by pltff. Comm.
2- 1-74	Certified record to the USCA.
11-18-74	Certified Record to the USCA.
11-18-74	Filed stipulation designating exhibits to be transmitted to the U.S.C.A.
11-20-75	Filed True Copy of USCA Mandate with opinion attached. Ordered that the judgment of said district court is affirmed in part & reversed in

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DATE	PROCEEDINGS
	part & that the action is remanded in part for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees. Docketed as a judgment # 75,926 on 11-24-75. Entered 12-5-75. (mailed notice)
12-12-75	Filed Pltffs. Van Gemert, Henning, Houchins, Pearlman, Chariott affidavit and notice of motion for an order awarding judgment to pltffs. in the amounts as indicated etc. Ret. 12-27-75.
12-12-75	Filed Pltffs. Van Gemert, Henning, Houchins, Pearlman, Chariott Memorandum of Law with respect to Damages to be awarded.
12-29-75	Filed Stip & Order that pltffs. motion (Van Gemert, Henning, Houchins, Pearlman & Chariott) is adjourned to 1-26-75, etc. Ryan J.
1-16-76	Filed Pltffs. Interrog. pursuant to FRCP 33.
1-21-76	Filed Pltff. Irving Steinman Committee Memorandum in support of motion for Judgment.
1-23-76	Filed Affidavit in response to motion to assess damages & in support of request for adjournment by S. Hazard Gillespie.
1-30-76	Filed Affidavit by S. Hazard Gillespie in support of the suggestions as to the procedure for deposition of the remaining issues, by Norman Winer.
2-19-76	Filed Affidavit by Stuart D. Wechsler in opposition to the suggestions as to procedure for disposition of remaining issues made by Norman Winer & supported by defts. attys.

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DATE	PROCEEDINGS
3-29-76	Filed Affidavit of S. Hazard Gillespie atty for deft, in opposition to the motion of pltffs etc, as indicated.
3-29-76	Filed memorandum of defts named in opposition to motion of certain pltffs, etc, as indicated.
3-29-76	Filed Exhibits (Volume 1) to the affidavit of S. Hazard Gillespie.
3-29-76	Filed Exhibits (Volume 2) to the affidavit of S. Hazard Gillespie.
3-29-76	Filed defts answers to defts interrogatories.
3-30-76	Filed Pltffs Affidavit & Notice of Motion rtble before Ryan J. to set a date for argument on the issues of law indicated.
4- 8-76	Filed revised copy of Schedule A. (Computation of Damages.)
4-13-76	Filed transcript of record of proceedings dtd. 9-19-66.
4-21-76	Filed Reply memorandum of law with respect to damages to be awarded.
4-22-76	Filed Reply memorandum in support of motion for judgment, as indicated.
4-28-76	Filed Pltffs. Memorandum of Law on issue of damages submitted on behalf of all members of the class.
5-27-76	Filed reply memorandum of the Boeing Company and Thomas R. Wilcox, etc, as indicated.
6- 3-76	Filed memorandum for pltffs as indicated.

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DATE	PROCEEDINGS
8-27-76	Filed True Copy of order and petition from the U.S.C.A.P. of a mandamus. Ordered that said petition is hereby denied without prejudice to the bringing of a new petition or proceeding on or before Nov 1, 1976. M/N
9-20-76	Filed Satification of Judgment for Costs #75,926 for defts appellees The Boeing Company and Thomas R. Wilcox.
11- 8-76	Filed Opinion #45342; Settle Order in accordance with the opinion stated. In the event the parties cannot agree on reasonable fees for pltffs counsel, affidavits in support thereof are to be submitted to the Court for determination within thirty days from the date hereof, Ryan, J. M/N.
11-18-76	Filed Pltffs Notice of Motion for reconsideration of its opinion dtd 11-8-76 rtble on 12-2-76.
11-18-76	Filed memorandum of law in behalf of all pltffs in support of motion to reconsider.
11-22-76	Filed memo of the Boeing Company and Thomas R. Wilcox in opposition to pltffs motion etc, as indicated.
11-22-76	Filed memorandum of the Boeing Company and Thomas R. Wilcox in response to certain issues etc, as indicated.
11-20-76	Filed corrected memorandum of the Boeing Company and Thomas R. Wilcox in response to certain issues raised by the proposed orders.

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DATE	PROCEEDINGS
11-26-76	Filed Pltffs memorandum of law to reconsider with respect to interest.
12- 1-76	Filed Reply memorandum of the Boeing Company and Thomas R. Wilcox, etc, as indicated.
12- 1-76	Filed memorandum of law of the Boeing Company, etc. as indicated.
12- 2-76	Filed Pltffs memorandum in support of pltffs motion for reconsideration as indicated.
12- 2-76	Filed Reply and supplemental memorandum in behalf of pltffs in support of motion to reconsider, etc, as indicated.
12- 3-76	Filed Pltffs memorandum in response to defts reply memorandum etc, as indicated.
12- 6-76	Filed True Copy of an order from the U.S.C.A.P. that the petition for a writ of mandamus filed by petitioners on 11-3-76 is withdrawn. M/N.
12-20-76	Filed motion for consideration by pltffs as indicated.
12-20-76	The motion to reconsider is granted and upon reconsideration, the decision is adhered to, Ryan, J. M/N.
12-20-76	Filed memo endorsed on motion filed 11-18-76. The motion to reconsider is granted, and upon reconsideration, the decision is adhered to, Ryan, J. M/N.
12-28-76	Filed judgment #77,129 ordered that pltffs shall recover as their damages the sum of $3,289,359.00

DATE	PROCEEDINGS
	and each member of class who has not redeemed his debenture etc shall receive $316.25 . . . . each pltff who has redeemed his debenture will receive 213.00 . . . all members shall receive interest at the rate allowed from date of this judgment to date of payment . . . ordered within 30 days from the date of this order pltffs attnys shall submit to Court a plan mailing of notice to class. . . . within 30 days from date of this order parties may submit plan for payment by a bank etc. ordered in event that parties cannot agree on fees affidavits shall be submitted to Court . . . Ordered this court shall retain jurisdiction pending implementation of this Judgment and order. Ryan J. Judgment entered 12-30-76 (ent on docket on 1-3-77) m/n.
1- 6-77	Filed Pltffs. Notice of Appeal from judgment entered 12-28-76. (mailed notice)
1-24-77	Filed Notice of Appeal by plaintiffs. m/n.
1-24-77	Filed Affidavit of Michael P. Fuchs, attorney for plaintiffs-appellant, certifying that the major portion of file is in the Federal Warehouse; that record will be transmitted to U.S.C.A. reflecting those documents that are physically in the possession of the Clerk's Office of the District Court; that the file presently in the Federal Warehouse has been ordered by the Clerk of the District Court; and that the record will be supplemented when file is received in the District Court.
2- 7-77	Filed Notice that the supplemental record has been certified and transmitted to the U.S.C.A.

DATE	PROCEEDINGS
1-28-77	Filed stip & order that the time for submission to the court of a plan or plans for mailing of notice to debenture holders and former debenture holders, for submitting plans for payment, and for submitting plans for payment, and for submitting affdvt in support of pltffs' counsel fees, referred to in the order this court entered on 12-28-76 is extended to one week after the determination, discontinuance or other disposition of the appeals from asid arder. to the U.S.C.A. . . . . BRYAN.J.
3-17-77	Filed notice that the supplemental record on appeal has been certified and transmitted to the U.S.C.A.
5-10-77	Filed true copy of USCA order with opinion attached reversing in part, remanding action to the D.C. for further proceedings without costs. Judgment entered. . . . Clerk. m/n.
6-23-77	Filed deft Boeing response to certain issues raised by pltff prposed orders.
7- 2-77	Filed Pltff's Reply Memo to Deft;'s Response to certain Issues raised by pltff's proposed orders.
7- 6-77	Filed Pltffs. Memoradum in reply to the Memorandum of Boeing Co. & Thomas R. Wilcox Regarding the proposed Judgments.
7- 6-77	Filed judgment and order that pltff class recover damages with interest with costs to be taxed; that pltff attny be awarded fees paid out of judgment etc; that defts deposit that amt. of this

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DATE	PROCEEDINGS
	judgment in a commercial bank at 6% per annum within 15 days etc.; that George Polleder is apptd Special Master to supervise the effectuation of this judgment. Ryan J. Judgment ent. Clerk 7-8-77. (on docket 7-11-77) m/n
7- 6-77	Filed memo end. on judgment . . . Counsel are directed to meet with Spec. Master to agree on a proposed plan to distribute judgment. Ryan J. m/n.
7-19-77	Filed deft notice of motion and affidavit for order amending portion of judgment of 6-30-77 relating to attnys fees. ret. 7-28-77 at 9:30AM.
7-19-77	Filed memo of deft in support of motion to amend judgment and order.
7-20-77	Filed oath & consent of Special Master.
7-25-77	Filed pltff's Memorandum in opposition to defts' motion to amend the Judgment and Order.
7-25-77	Filed Pltffs' Memorandum in opposition to motion to amend the Jugment and order.
7-28-77	Filed pltff memo in behalf of pltff in opposition to motion to amend judgment.
7-28-77	Filed application of I. Steinman for application of fees and expenses.
7-29-77	Filed pltff memo in support of fee application.
7-29-77	Filed application of Kass Goodkind for award of attny's fees.
7-29-77	Filed Appendix to application Vol 1.

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DATE	PROCEEDINGS
7-29-77	Filed Exhibits to application.
8- 2-77	Filed index to affirmation of services.
8- 3-77	Filed notice of filing and proof of service.
8- 3-77	Filed reply memo of deft in support of motion to amend judgment and order.
8- 8-77	Filed comments on behalf of pltff on Boeing's reply memo.
9- 1-77	Filed pltfs' Answering affidavit to certain applications for allowances by Irving Steinman.
9-16-77	Filed Answering Affidavit to certain Fee Applications, for pltffs, by Stuart D. Wechsler. (with 1 volume of exhibits)
9-22-77	Filed deft's Affidavit in support of response to fee applications by various pltffs' attys. by S. Hazard Gillespie.
9-22-77	Filed defts' memorandum in response to fee applications.
9-22-77	Filed Memo endorsed on Notice of Motion dated 7-19-77, ordered that the members of the Pltffs' Committee of attys. be awarded their fees, expenses & disbursements as fixed by the court to be paid out of said total amt. of this judgt. and as indicated . . . . . Ryan, J. m/n
10- 5-77	Filed Response of Alex Elson, Willard J. Lassers and Aaron S. Wolff of Chicago, Illinois Members of the firm of Elson, Lassers & Wolff to answering affidvt. of Irving Steinman & supplemental affirmance with reference to fees of Norman Winer.

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DATE	PROCEEDINGS
10- 5-77	Filed Notice of filing & proof of service.
10-21-77	Filed defts' Notice of Appeal to USCA for second Circuit from the Judgt. & Order dated 6-30-77 & the Order dated 9-22-77 denying the defts' motion to amend said Judgt. & Order. m/copies.
11- 9-77	Filed stipulation designating record on appeal.
11- 9-77	Filed Notice of certification on record on appeal.
3-15-78	Filed pltffs Affirmation under penalties of perjury, served by George J. Solleder, Jr. Esq. Special Master, with a notice of petition & a proposed order to be settled before this court on 2-27-78, made suggestions to the Special Master in connection with the documents involved, Joined in the request that the order be signed. by Irving Steinman.
3-15-78	Filed Affirmation of pltffs. by Norman Winer.
3-10-78	Filed ORDER that the form of Notice (Exhibit "A") Proof of Claim (Exhibit "B") Notice to brokerage firms, banks & other financial institutions etc. they are approved & confirmed, Ordered that the Notice of Availability (Exhibit D) shall be published in the NY Times etc, the first publication not later than 4-1-78 after the signing of this Order, etc. Ordered, that the Special Master be & is allowed the sum of $7,800., as an initial payment for his services rendered up to 12-31-77, such payment to be made from the Judgment Fund. Ryan, J. m/n

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DATE	PROCEEDINGS
5-11-78	Filed OPINION # 47198, Pltff's counsel in these consolidated class actions have moved for an award of attnys' fees. The Judgt. provided that pltffs' counsel would be awarded fees & expenses from the total amt. of the judgt. Boeing appealed this portion of the judgt. & on 3-27-78 the Court of Appeals issued an opinion not to be paid from any amt. of the judgt. which is not claimed by absent class members. The Special Master is in the process of attempting to locate class members, etc. After all claims have been finally determined, an award to pltffs attnys. taking into consideration the quality of their work & the length of time that this litigation has lasted. So ordered Ryan, J., # m/n
6-19-78	Filed ORDER, ordered that the publication of the Notice of Availability, in the N.Y. Times 5-2-78 & 5-3-78 is approved. Ordered that the withdrawal from the Judgt. Fund of the sum of $49,672.04 etc. Ordered that the withdrawal from the Judgt. Fund in the sum of $1,957.12 in payment of the invoices etc. Ordered that the Special Master is allowed in the sum of $12,750.00 in payment for his services rendered etc.. Ryan, J. m/n
8-16-78	Filed ORDER, ordered that time for filling Proofs of Claim is ext. to 3-1-79, further ordered, that the Special Master is authorized to send an additional Notice to debentureholders who have not filed a Proof of Claim. Ryan, J. m/n

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
10- 4-78	Filed Pltffs' NOTICE OF MOTION, for an order Providing that those entities which were paid upon redemption of the subject debentures by The Boeing Co. be determined to be proper claimants of the portion of the judgt. fund to be paid to redeeming debentureholders & as indicated. Ret: 10-12-78 at 10:30 Room 2203.
10-10-78	Filed The Chase Manhattan Bank, N.A.'s AFFIDAVIT in opposition to pltffs' motion for an order directing Chase to deliver to the Special Master copies of all cancelled checks sent out, etc. by John W. Steinhoff.
10-10-78	Filed MEMORANDUM OF THE Chase Manhattan Bank, N.A. in opposition to pltffs' Motion for an order directing the production of certain documents & permitting access to its files.
10-10-78	Filed Special Master's AFFIRMATION. (GJS)
10-10-78	Filed defts' AFFIDAVIT in opposition to motion to pay damages to NON-Members of the Pltff Class, by S. Hazard Gillespie.
10-11-78	Filed pltffs' AFFIRMATION in order to state pltffs' position on the motion made by the Kass firm which also represents pltffs., by Norman Winer. (NW)
10-13-78	Filed pltffs' AFFIDAVIT in Reply to opposition of the Boeing Co. and the Chase Manhattan Bank, N.A. by Stuart D. Wechsler.
10-18-78	Filed pltffs'. AFFIDAVIT, by Irving Steinman.
10-20-78	Filed Special Master's, SUPPLEMENTAL AFFIRMATION.

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DATE	PROCEEDINGS
10-25-78	Filed defts' SUPPLEMENTARY AFFDVT. in opposition to Motion to pay damages to Non-Members of the pltff. Class, by S. Hazard Gillespie.
10-27-78	Filed pltffs' Affdvt. in response to Affirmation of the Special Master, George J. Solleder., By Stuart D. Wechsler.
10-27-78	Filed pltffs' AFFIDAVIT, in response to the Supplementary Affirmation of George J. Solleder, Jr. dated 10-19-78, By Stuart D. Wechsler.
10-30-78	Filed Special Master's REPLY AFFIRMATION. (GJS)
10-30-78	Filed Special Master's NOTICE OF PETITION in support thereof, will be presented for settlement to USDC. Ret: 11-3-78 at 10:00 a.m.
11-15-78	Filed ORDER, Ordered that the withdrawal from the Judgt. Fund of the sum of $186,056.50, representing the redemption price, together with such amt. that may be necessary for past-due coupons, if any, for payment by Chase Manhattan Bank, N.A. to claimants, who have submitted their debentures for redemption since 7-6-77, & have filed Proofs of Claim with the Special Master, is, authorized & approved. Ryan, J. m/n
11-27-78	Case re-assigned to Judge Cooper.
12- 2-78	Filed Notice of Petition of George J. Solleder, Jr. in support thereof (Order annexed) for settlement. Returnable 12-13-78.
12-13-78	Filed pltffs' Affirmation by atty. Norman Winer, Esq.

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DATE	PROCEEDINGS
12- 7-78	Mailed Notice of Re-assignments to all attys. on record.
12-12-78	Mailed Notice of Re-assignment to Irving Steinman.
12-26-78	Filed Affirmation by George J. Solleder, Jr.
12-27-78	Filed Affirmation of Norman Winer for pltffs.
2- 1-79	Filed Order. Ordered that: the withdrawal from the Judgment Fund in the sum of $790.80 in payment of the invoices submitted to the United Service Printing Co. for its services in printing the Notices to debentureholders. Ordered that the withdrawal from the Judgment Fund in the sum of $3166.22 in payment of the charges submitted by Chase for its services as a depository for the Judgment Fund and in processing proofs of claim, ordered that the Special Master be and he hereby is allowed the sum of $37,795.00 in payment for his services and those of Anthony J. Scilletti, rendered from 6-1-78 to 11-30-78 as shown by the transcript of services, such payment to be made from the Judgment Fund. So Ordered ..... Ryan, J. m/n
3- 8-79	Filed ORDER, Ordered that the time for filing Proofs of Claim is ext. to 9-1-79, further ordered that the Special Master is authorized to hire a professional search firm, approved by the Court to aid the Special Master in locating those to whom Notices & Proofs of Claim were mailed but returned by the P.O. Dept. as undeliverable. Cooper, J. m/n
3-27-79	Filed Notice of Entry on order dated 3-8-79.

Chronological List of Relevant Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Van Gemert I, 74-1157

DATE	PROCEEDINGS
1- 2-74	Filed copies of docket entries and (5) copies of notices of appeal (plaintiffs)
2- 1-74	Received docket fee (Van Gemert, et al.)
2- 1-74	Filed record (original papers of district court) (& in 74-1158) (all pltffs.-Van Gemert, et al.)
2- 1-74	Received docket fee (Van Gemert, Henning, Houchins, Pearlman & Chariott) (& in 74-1158-59)
2- 5-74	Received docket fee (Finn, et al.) (& in 74-1158-59, 74-1165, 74-1185)
2- 8-74	Received docket fee (Dr. Diener) (& in 74-1158-59, 74-1185)
3- 7-74	Filed motion for leave to file separate appellants brief and to argue separately, with proof of service
3-13-74	Filed order extending time to file appellant's brief and appendix to 5-15-74—on consent
3-13-74	Filed affidavit in support of motion for leave to file separate appellants brief and to argue separately with proof of service.
3-22-74	Filed order granting motion for leave to file separate appellant's brief & a joint appendix and present separate arguments on the appeal herein

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DATE	PROCEEDINGS
4-12-74	Filed order extending time to file appellant's brief & appendix to 7-15-74—(on consent) (all appellants')
7- 9-74	Filed order extending time to file appellants' briefs and appendices from 7-15-74 to 9-3-74 (on consent) (& in 74-1158-59, 74-1165, 74-1185)
8-30-74	Filed order extending time to file appellant's brief and appendix from 9-3-74 to 9-6-74 (on consent) (& in 74-1158-59, 74-1165, 74-1185)
9- 3-74	Filed order granting leave to file appellant's brief not to exceed 76 pages (on consent) (& in 74-1158-59, 74-1165, 74-1185)
9- 6-74	Filed three volumes of appendix, appellant, p/s
9- 6-74	Filed briefs, appellants, p/s (& in 74-1158-59, 74-1165, 74-1185)
9- 6-74	Filed briefs, appellants, p/s (& in 74-1158-59, 74-1165, 74-1185)
9- 6-74	Filed one volume of exhibits, appellants, p/s (four copies) (& in 74-1158-59, 74-1165, 74-1185)
9-19-74	Filed motion and order (endorsed) extending time to file appellee's brief from 10-3-74 to 10-10-74 (on consent)
10- 8-74	Filed motion and order (endorsed) granting leave to file appellee's brief not to exceed 61 pages
10-10-74	Filed order granting leave to file appellee's brief with an appendix

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
10-10-74	Filed brief, appellee, p/s (& in 74-1158-59, 74-1165, 74-1185)
10-24-74	Filed order extending time to file appellant's reply brief from 10-24-74 to 11-14-74 (& in 74-1158-59, 74-1165, 74-1185) (Van Gemert, Henning, Houchins, Pearlman and Chariott)
10-24-74	Filed reply briefs, appellants, p/s (& in 74-1158-9, 74-1165, 74-1185)
11-14-74	Filed reply briefs, appellants, p/s (& in 74-1158-9, 74-1165, 74-1185) (Van Gemert, Henning, Houchins, Pearlman and Chariott)
11-18-74	Filed supplemental record (Original papers of district court) (& in 74-1158-9, 74-1165, 74-1185)
2-26-75	Argument heard (By: Lumbard, Oakes, Timbers) (& in 74-1158-9, 74-1165, 74-1185)
7-14-75	Judgment affirmed in part; reversed and remanded in part, Oakes, C. (& in 74-1158-9, 74-1165, 74-1185)
7-14-75	Filed judgment (& in 74-1158-9, 74-1165, 74-1185)
7-25-75	Filed itemized and verified bill of costs, appellant, p/s (Van Gemert et al. (& in 74-1158-9, 74-1165, 74-1185)
7-28-75	Filed itemized and verified bill of costs, appellant, (Joanne W. Finn)
7-31-75	Filed motion to stay mandate pending certiorari
8- 1-75	Filed affidavit of service (Finn)
8- 4-75	Filed affidavit in opposition to motion to stay mandate

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
8- 5-75	Filed statement in support of opposition papers to motion for stay mandate
8- 6-75	Filed affidavit in opposition to motion to stay mandate, p/s (Weiner)
8- 6-75	Filed affidavit in opposition to bills of costs
8-13-75	Filed order granting leave to stay issuance of mandate until 9-22-75
9-22-75	Filed statement of costs (Van Gemert, et al.) (& in 74-1158-9, 74-1165, 74-1185)
9-22-75	Filed statement of costs (Finn, et al.) (& in 74-1158-9, 74-1165, 74-1185)
9-22-75	Filed statement of costs (Diener) (& in 74-1158-9, 74-1165, 74-1185)
9-22-75	Filed copy of petition for writ of certiorari (& in 74-1158-9, 74-1165, 74-1185)
9-25-75	Filed notice of filing of petition for writ of certiorari (75-452)
11-17-75	Filed certified copy of Supreme Court order denying petition for writ of certiorari (75-452)
11-17-75	Issued mandate (opinion, judgment and three statements of costs) (& in 74-1158, 1165, 1185)
11-19-75	Original and supplemental records returned to district court

Chronological List of Relevant Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Van Gemert II, 77-7009

DATE	PROCEEDINGS
1- 6-77	Filed copy of notice of appeal
1- 6-77	Filed motion for an expedited appeal, appellant
1- 6-77	Received docket fee
1- 7-77	Filed affidavit of service for motion for an expedited appeal, appellant
1-10-77	Filed copies of docket entries and notice of appeal
1-12-77	Kass, Goodkind, Wechsler & Gerstein filed Form C
1-12-77	Kass, Goodkind, Wechsler & Gerstein filed Form D
1-14-77	Filed copies of docket entries and notice of appeal (members of the class)
1-18-77	Filed order granting motion for a preference to the extent indicated: record by 1-24-77; appellants' brief and appendix by 1-31-77; appellees' brief by 2-7-77; argument ready to be heard by 2-14-77
1-20-77	Received docket fee (& in 77-7031)
1-20-77	Norman Winer, Esq. filed form C (& in 77-7031)
1-20-77	Norman Winer, Esq. filed form D (& in 77-7031)
1-21-77	Filed affidavit of service for Forms C and D from Norman Winer, Esq.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
1-24-77	Filed record (original papers of district court)
1-31-77	Filed appendix, appellant, p/s (& in 77-7031)
1-31-77	Filed briefs, appellants, p/s (Van Gemert, et al.) (& in 77-7031)
1-31-77	Filed briefs, appellants, p/s (Committee of Attorneys) (& in 77-7031)
1-31-77	Filed briefs, appellants, p.s (atty. Winer) (& in 77-7031)
2- 7-77	Filed briefs, appellees, p/s (& in 77-7031)
2- 7-77	Filed supplemental record (original papers of district court)
2-10-77	Filed motion for an order adjourning the argument from 2-25-77 to 2-28-77, p/s
2-10-77	Filed order denying motion to adjourn argument of appeal (& in 77-7031)
2-22-77	Filed reply briefs, appellants, p/s (Van Gemert, et al) (& in 77-7031)
2-22-77	Filed reply briefs, appellants, p/s (atty. Winer) (& in 77-7031)
2-25-77	Argument heard (By: Mansfield, VanGraafeiland, Mishler) (& in 77-7031)
3-17-77	Filed 2nd supplemental record (original papers of district court)
4-18-77	Judgment affirmed in part, reversed in part and remanded, VanGraafeiland, C.J. (& in 77-7031)
4-18-77	Filed judgment (& in 77-7031) (N/C)

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
4-22-77	Filed itemized and verified bill of costs, appellants, p/s (& in 77-7031) (Committee of Attorneys)
4-25-77	Filed itemized and verified bill of costs, p/s (Van Gemert, et al)
4-27-77	Filed affidavit in opposition to request of appellants for costs, appellees, p/s (& in 77-7031)
4-29-77	Filed itemized and verified bill of costs, p/s (Finn, et al)
5- 9-77	Issued mandate (opinion and judgment) (& in 77-7031)
5-11-77	Original, supplemental and second supplemental records returned to district court (& in 77-7031)
5-12-77	Filed receipt of return of original, supplemental and second supplemental records to district court (& in 77-7031)

Chronological List of Relevant Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Van Gemert III, 77-8437

DATE	PROCEEDINGS
10-25-77	Filed copies of docket entries and notice of appeal
10-28-77	Filed motion for an expedited appeal, appellees, p/s (Company of Attorneys for Plaintiffs)
11- 3-77	Filed scheduling order # 1 (CAMP)
11- 9-77	Received docket fee
11- 9-77	Filed record (Original papers of district court)
11-18-77	Filed brief and appendix, appellants, p/s
11-30-77	Filed briefs, appellees, p/s (Kass Goodkind)
11-30-77	Filed briefs, appellees, p/s (Nathan, Mannheimer)
11-30-77	Filed briefs, appellees, p/s (Irving Steinman)
12- 8-77	Filed reply brief, appellants, p/s
12-12-77	Argument heard (By: Mulligan, Oakes, VanGraafeiland, CJJ)
3-27-78	Judgment reversed and remanded with instructions, VanGraafeiland, C.J.
3-27-78	Dissenting in part in separate opinion, Oakes, C.J.
3-27-78	Filed judgment (VACATED 12-21-78)
4-10-78	Filed itemized and verified bill of costs, appellants, p/s

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
4-10-78	Filed petition for rehearing and rehearing en banc, appell (Kass, Goodkind)
4-10-78	Filed petition for rehearing and suggestion for rehearing appellee, p/s (Nathan Mannheimer)
4-12-78	Filed motion to disallow costs, appellees, p/s 717
5- 3-78	Filed order granting motion to disallow costs 717
6-30-78	Filed order granting petition for rehearing and rehearing en banc. The Court directs that additional briefs be filed: appellants brief July 25, 1978; appellees' brief August 8, 1978, appellants' reply brief August 18, 1978. No oral argument.
7-25-78	Filed brief, appellant, (en banc), p/s
7-28-78	Filed motion for leave to file brief as amicus curiae, p/s 1576 George J. Solleder, Special Master (ORDER ENDORSED: (8-) Granted.
8- 4-78	Filed affidavit in support of motion for leave to file brief amicus curiae, appellant, p/s
8- 4-78	Filed affidavit in support of motion for leave to file brief amicus curiae, appellee, p/s 1576
8- 7-78	Filed affirmation in support of motion to file brief as amicus curiae, appellee, p/s (Nathan, Mannheimer, etc.)
8- 8-78	Filed brief en banc, appellees, p/s (Kass, Goodkind, Wechsler & Gerstein)
8- 8-78	Filed brief en banc, appellees, p/s (Irving Steinman)
8- 8-78	Filed brief en banc, appellees, p/s (Nathan, Mannheimer Asche, etc.)
8- 9-78	Filed amicus curiae brief (Solleder, Esq.)

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
8-17-78	Filed motion for leave to intervene and file brief (Dept. of Audit and Control of the State of New York) p/s
8-17-78	Filed memorandum of law in support of motion for leave to intervene and file brief, (Dept. of Audit and Control of NYS) p/s
8-18-78	Filed reply brief en banc, appellants, p/s
8-23-78	Filed affidavit in opposition to motion for leave to intervene, appellants, p/s
8-28-78	Filed affidavit relating to motion for leave to intervene, appellees, p/s
8-30-78	Filed affidavit in support of motion for leave to intervene, appellees, p/s (Kass, Goodkind, Wechsler & Gerstein)
9- 8-78	Filed order that the motion on behalf of the State of New York for leave to intervene be and it hereby is denied. It is further ordered that the proposed intervenor's brief will be accepted and considered by the court as a brief amicus curiae
9- 8-78	Filed brief, amicus curiae, (New York State) en banc
12-21-78	Filed order vacating judgment of 3-27-78
12-21-78	Filed opinion en banc, judgment affirmed, Kaufman, ChJ.
12-21-78	Dissenting in separate opinion, Van Graafeiland, CJ (with whom judges Mulligan and Timbers concur)

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
12-21-78	Filed judgment
1- 5-79	Filed motion EN BANC to stay mandate pending application for writ of certiorari, appellant, p/s # 1204
1- 8-79	Filed itemized and verified bill of costs, appellee, p/s (Steinman)
1- 9-79	Filed itemized and verified bill of costs, appellees, p/s (Kass, Goodkind, etc.)
1-10-79	Filed itemized and verified bill of costs (Nathan Mannheimer etc.)
1-10-79	Filed affidavit in opposition to motion to stay mandate etc. appellee, p/s
1-17-79	Filed order granting motion to stay issuance of the mandate pending application to the Sup. Court for writ of cert.
2- 9-79	Filed motion en banc to stay mandate for an additional 15 days pending application for writ of certiorari, appellants, p/s 1584
2- 9-79	Filed affidavit in opposition to motion to stay mandate for an additional 15 days, appellee, p/s
2-23-79	Filed order granting stay of mandate for an additional 15 days to and including February 26, 1979
3- 5-79	Filed notice from Supreme Court of filing petition for certiorari SC # 78-1327
5-18-79	Certified copy of order from Supreme Court granting petition for writ of certiorari filed (S.C. # 78-1327)

Supreme Court of the United States

October Term, 1978

No. 78-1327

THE BOEING COMPANY (formerly THE BOEING AIRPLANE COMPANY), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

Brief for Respondents in Opposition to a Petition for a Writ of Certiorari

NORMAN WINER
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New York, N. Y. 10017

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Supreme Court of the United States

OCTOBER TERM 1978

THE BOEING COMPANY (formerly The Boeing Airplane Company), *et al.*,

Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

No. 78-1327

BRIEF FOR RESPONDENTS

The Question Presented

The issuer of convertible debentures in bearer form wrongfully rejected tenders by holders who asked it to convert their debentures into common stock; a class action in behalf of the holders resulted in a judgment that a fixed sum be paid by the issuer with respect to each debenture; that sum multiplied by the number of debentures has been deposited awaiting claims by the holders; are the fees and costs of counsel to be allocated equally to all of the debentures or only to those for which claims are filed?

The Opinion of the Court of Appeals

The masterful opinion of Chief Judge Kaufman (App. pp. 1a-17a) makes superfluous any comment by us on the central issue.

We limit ourselves, therefore, to answering directly the alleged law reason and the alleged policy reason offered as justification for a review.

ANSWERING POINT I

Defendant asks this court to repudiate its opinion in *Alyeska*.

One of the ironies in the petition is that defendant seeks to assimilate this case to *Alyeska;* whereas the opinion in *Alyeska* took great care to distinguish that case from this one.

Alyeska was brought in behalf of an amorphous constituency, called "the public," to enjoin the government from issuing permits for construction of a pipeline. The litigation was successful temporarily and the Court of Appeals awarded attorneys' fees to the representatives of "the public" on the theory that their attorneys performed the services of a "private attorney general" (421 U. S. 240, 241-2).

The opinion of this Court, after tracing the history of attorneys' fees in the federal courts and recognizing that in this country generally one party does not pay the other's fees, stated that there are two situations in which, indirectly or directly, this is not so, namely:

1) where a "common-fund" has been created or preserved, payment out of the fund comes indirectly from the defendant and

2) where a "common-benefit" has been conferred the payment may come directly from the defendant.

The present case is one of a common fund. The *Alyeska* opinion could not have been clearer in distinguishing this case from *Alyeska.* The court, through Mr. Justice White, wrote:

> "To be sure, the fee statutes have been construed to allow, in limited situations, a reasonable attorney's fee to the prevailing party in excess of the small sums permitted by §1923. In *Trustees v. Greenough,* 105 U. S. 527 (1882), the 1853 Act was read as not interfering with the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees from the fund or property itself or directly from the other parties enjoying the benefit" (p. 257).

In a footnote the opinion quoted Mr. Justice Bradley to the effect that the fee statutes were not intended to interfere with the historic power of the court

> "in cases of administration of funds under its control, to make such allowances to the parties out of the fund as justice and equity may require" (pp. 257-8).

In *Alyeska* the court stated that, on the facts before it, to apply the common-benefit exception would be to " 'stretch it totally outside its basic rationale' " (p. 245). The opinion recognized that *Sprague v. Ticonic National Bank,* 307 U. S. 161 (1939) "might be read" as applying the *Greenough* or "common fund" doctrine

> "But any such suggestion [that the common-benefit and the common-fund doctrine are one] is without support either in the opinion in *Greenough,* which was limited to a common-fund rationale, or in the express terms of the statute" (p. 258, footnote 30).

Thus, this court could not have been clearer in distinguishing the common fund from the common benefit; nor could it have been clearer in holding that *Alyeska* fell neither within the common-fund exception nor the common-benefit exception. The holding was that it was not for the courts to make a new category—one which did not involve a common fund and one which stretched the common-benefit exception unduly.

ANSWERING POINT II

Public policy supports the holding of the Court of Appeals.

The opinion of Chief Judge Kaufman describes the public policy interests of plaintiffs, plaintiffs' attorneys and defendants in class actions (App. pp. 14a-17a). Judge Kaufman points out that the fees of attorneys in a class action are now fixed by a number of considerations among which the amount of the recovery, but not the number of claims filed, is one (App. 14a, footnote 18). Therefore, if Boeing's contention were accepted, the failure of some to file claims would injure those who do file claims and would benefit either the party adjudged to pay the sum or a state which would receive a windfall. It follows that the longer the defendant can protract the litigation the greater the burden which it can impose on the claimants and the greater the benefit which it or the state will receive. As Judge Kaufman points out, the ruling sought by

Boeing would put the victim at a disadvantage either way —it would stimulate the lawyers to settle quickly "for less than adequate sums," failing which it would cause the surviving claimants to pay more than their share of the fees when the litigation continues (App. pp. 16a-17a).

Boeing argues that if a fee is charged against the debentures for which no claim is made, the fee is being charged to money which "belongs to others" (p. 4) or comes "from money that did not belong to the class because it was never claimed" (p. 6) or "from money which belongs either to Boeing, the loser in this litigation, or to one or more state governments under theories of abandoned propery" (p. 10).

This is an abuse of the word "belongs." It has been adjudged that the money is to be paid to the holders of identifiable debentures. If the money "belongs" to anybody, it belongs to the unidentified holders of identified bonds and, contrary to what Boeing says, those holders are members of the class. If the money is ultimately paid to Boeing or to the state it will not be because the money belongs to either of them but because the person entitled to it cannot be found.

If the claiming members of the class are to share the full legal cost then the party benefiting will be the party which has been adjudged obligated to pay out of that money or a state which receives it as a windfall.

As we have said, if the benefit of the reduced number of claims will accrue to the defendant then there is every reason for the defendant to protract the litigation. This case is an excellent example. In thirteen years a) people have died, b) addresses have changed, c) brokers have gone out of business, d) banks have destroyed their records and so forth. In each year of the thirteen there have undoubtedly been added a new number of unfindable holders.

It would serve Boeing well to prolong the litigation if it is to receive back intact more each year of the dollars which it has deposited for non-claimants. And every such delay would, under Boeing's theory, add to the burden borne by the innocent plaintiffs who do file claims.

POINT III

The discretion of the court should not be exercised in favor of the granting of certiorari.

This is doubtless a case of first impression because so few of such cases have been fought through to decision by the Court. It has no application to settlements where the fees are agreed upon by the parties.

This is not a class action for the lady who overpaid $10 for her dress or the customer who overpaid $2 for his medicines. It is not a case of fluid recovery where the law has been pretty well settled by *Eisen v. Carlisle & Jacquelin*, 479 F. 2d 1005 (2d Cir. 1973), remanded 417 U. S. 156 (1974).

The justice and the logic are clear; the fees and costs of the total recovery should not be assessed against victims of the wrong. To reward the wrongdoer at the expense of the victims under such circumstances would seem hardly a reason for this court to exercise its discretion to review the decision below.

Dated: New York, N. Y.
March 10, 1979

Respectfully submitted,

NORMAN WINER,
Attorney for Respondents.

Supreme Court, U. S.
FILED
MAR 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1327

THE BOEING COMPANY

(formerly The Boeing Airplane Company), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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§1200 N. Y. S. Abandoned Property Law 3

RULE CITED.

F.R.C.P.
23(b)(1) 8
23(b)(3) 9

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No.

THE BOEING COMPANY (formerly The Boeing Airplane Company), *et al.*,

Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Respondents pray that the request by petitioners that a writ of certiorari issue to review the judgment entered on December 21, 1978, by the United States Court of Appeals for the Second Circuit, sitting *en banc*, reversing the decision of a panel of that court, and affirming a judgment and orders of the United States District Court for the Southern District of New York which are in accord and consistent with this court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 420 (1975), and the "American rule" there enunciated, be denied.

The *en banc* Court of Appeals held that the judgment award against Boeing constituted a common fund within

the meaning of *Alyeska, supra,* in which every class member had a vested interest, and that every class member had benefited. Therefore, it held that attorneys fees could properly be awarded from the fund as a whole.

Question Presented

Does the creation of a fund by judgment after trial and appellate review in a class action litigation confer a benefit sufficient to justify an award of attorneys fees to the attorneys for the successful class, from the fund, which award would take into consideration the entire judgment fund?

Statement of the Case

The Court of Appeals in reversing the trial court (Van Gemert I, 53a-82a) held that Boeing had failed to provide reasonable notice, as required by the New York law of contracts, of the redemption of its convertible debentures.

On appeal from the judgment awarding damages without interest, only one of the three firms of attorneys appointed by the District Court as Plaintiffs Committee of Attorneys, acting for itself, raised the question of dividing unclaimed portions of the judgment award among claiming members of the class (51a).

The judgment entered by the District Court (39a-42a) on remand from Van Gemert II (553 Fed. 2d 812, 1977) (45a-52a) did not hold "that even though claiming class members could not directly invade the sums remaining unclaimed in order to pay their attorneys fees, * * * these funds could be used on a pro rata basis to pay the attorneys' fees of the class" (5).* This judgment together with Judge Ryan's order of September 22, 1977, denying petitioners' motion to amend the judgment (43a-44a), upon which petitioners' application for a writ of certiorari is ultimately based, provides that the plaintiff class shall recover as their damages from the defendants the principal sum of $3,289,359 with interest from March 9, 1966, to the date of the judgment—June 30, 1977, and that "members of the plaintiffs Committee of Attorneys be awarded their fees, expenses and disbursements as fixed by the Court to be paid out of said total amount of this judgment" (40a).

*Page numbers in parentheses refer to petitioners' brief.

It is not disputed that after payment of attorneys fees, expenses and disbursements, and claiming class members aliquot shares, the judgment fund remaining does not belong to the class members who received their shares* (Van Gemert II, *supra,* 51a).

In Van Gemert III (27a-37a) (573 Fed. 2d 733), the decision of the panel of the Court of Appeals which was reversed by that Court sitting *en banc* (1a-17a), the panel held: "We hold that until absent class members receive the benefit of the attorneys' labors by claiming their portions of the award, no such charge or assessment [attorney's fee] may be paid from their undistributed shares" (29a). In effect, the panel held that the benefits attained by plaintiffs' attorneys had to be claimed by the individual class member before an appropriate award for attorneys' fees and expenses could be made and then prorated against each share claimed only.

*Respondent believes any unclaimed portions should escheat to New York State under §1200, N. Y. S. Abandoned Property Law.

The Court of Appeals *en banc* reversed the panel deciding Van Gemert III, and affirmed the District Court's judgment and order and the order denying petitioners' motion to amend the judgment, and held by a 6-3 vote that in accord with the "American rule" (17a) the judgment against Boeing constituted a common fund within the meaning of *Alyeska, supra* (9a), and that the "fees of the attorneys for the class will be deducted from the amount for which Boeing had already been held liable" (17a)—including that part of the class action judgment award which is unclaimed (3a).*

The Court of Appeals *en banc* stated that its "conclusion is predicated on considerations of equity and sound policy and is sustained as well by longstanding precedent" (3a). The opinion of Chief Judge Kaufman, writing for the majority (1a-17a) sets forth the bases from which this conclusion was reached.

Reasons for Denying the Writ

This is not an appropriate case for review on certiorari since none of the considerations governing review on certiorari are present. The Court of Appeals in its 6-3 *en banc* decision for which certiorari is sought did not overrule the Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U. S. 240 (1975), but followed it. *Alyeska, supra,* in holding that attorneys fees were not permitted to be charged against "losing" parties in "private attorney general" type cases as one of the exceptions to the "American rule" that "the

*The Court of Appeals *en banc* held that Van Gemert II had not reached the issue presented in this appeal in its decision, and that therefor the law of the case doctrine did not apply. It went on to say that even if it did apply, the *en banc* court would not be bound (6a-7a, fn. 9).

prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser" (*Alyeska, supra,* at p. 247), stated as a recognized exception to that rule what has come to be called the common fund doctrine —that a "party preserving or recovering a fund for the benefit of others * * * [may recover] attorneys fees, from the fund * * *" (*Alyeska, supra,* at p. 257). The *en banc* Court of Appeals decision is in total accord and consistent with this holding. Its decision applies to a class action which is tried and won by plaintiffs on the merits, the same standards followed without exception by the courts in administering class actions which are terminated by settlement with the defendants disclaiming all liability.

POINT I

The decision of the *en banc* Court of Appeals is in accord and consistent with this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*

Petitioners' application for review is not based on an *en banc* decision contrary to a decision of this Court—as petitioners claim in Point I of their petition. It is based on an *en banc* decision which follows a long line of Supreme Court decisions commencing with *Trustees v. Greenough* (105 U. S. 527) in 1882, and followed thereafter, *inter alia,* in *Central Railroad & Banking Co. v. Pettus,* 113 U. S. 116 (1885); *Sprague v. Ticonic National Bank,* 307 U. S. 161 (1939); *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375 (1970); *Hall v. Cole,* 412 U. S. 1 (1973); *Rich v. U. S., Industrial Lbr. Co. Inc.,* 417 U. S. 116 (1974), and *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U. S. 240 (1975), which hold, as applicable herein and as stated by the *en banc* Court below "* * *

historically, the federal courts have exercised an equitable power to allow attorneys' fees and costs to be charged against a fund created, increased, or protected by successful litigation" (8a).

In *Alyeska,* certiorari was granted by this Court (419 U. S. 283) (1974) to determine whether an award of attorneys' fees by the Court of Appeals for the District of Columbia Circuit to respondents against petitioner based upon the Court's equitable powers and the theory that respondents were entitled to fees because they were performing the services of a "private attorney general," was appropriate. On this point this Court reversed (421 U. S. 240) (1974). This decision is totally inapplicable to the case at bar, as the *en banc* decision of the Court of Appeals for the Second Circuit in Van Gemert (1a-17a) was not based upon, nor did it even consider, the question of attorneys' fees for "private attorney generals" but rather was based solely on what has come to be known as the common fund rule. Indeed the Supreme Court itself in the majority opinion of Mr. Justice White in *Alyeska, supra,* defined the limits of that decision when, after re-affirming the general rule that "• • • absent statute or enforceable contracts, litigants pay their own attorneys fees. • • •" and after referring to the two exceptions to such general rule, to-wit: (1) "• • • the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. • • •" and (2) the power of a court to "• • • assess attorneys' fees for the 'wilful disobedience of a court order' • • • or when the losing party has 'acted in bad faith' • • •" (pp. 257-259), it stated:

> "• • • These exceptions are unquestionable assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here. The Court of Appeals expressly disclaimed reliance on any of them" (pp. 259-260).

Petitioners' entire efforts in this Court, as well as before the *en banc* court below, have been based on one premise alone—that regardless of the fund created, the vesting of rights, and the judgment entered after trial and appeal, the only persons benefiting in a class action are those who file claims pursuant to the judgment prior to the award by the court of attorneys' fees, and that therefore such fees should be based on the dollar amount so claimed and not the entire judgment amount (ignoring for argumentative purposes, all the other considerations which are used by a court in determining fees in successful class actions). In support of this proposition, petitioners have attempted to distinguish opinions by this Court where such a proposition was not even considered, let alone decided, such as *Trustees, supra; Pettus, supra; Sprague, supra,* and *Alyeska, supra,* but which are authority for the presently prevailing rule of awarding attorneys' fees and costs to a party succeeding in preserving or creating a fund for others to be paid from the fund. Petitioners accept this Rule—since they at least agree that atttorneys' fees are properly chargeable against that part of the judgment to which claims are filed by class members. They seek, however, to divide the judgment into two parts—one which vests, and one which does not vest. For this startling theory, they offer no

law or judicial precedent, other than their own definition of the meaning of "benefit" (11); nor do they succeed in demonstrating any error in the *en banc* court opinion, which, it is submitted, is in full accord with the cases in this Court from *Trustees v. Greenough, supra,* through *Alyeska, supra.*

The plaintiffs in the case at bar were certified as a Rule 23(b)(1) Federal Rules of Civil Procedure class, irrevocably binding all class members (with no right to opt out), present or not and filing proofs of claims or not. *Mungin v. Florida E. C. R. Co.,* 1970, D. C. Fla., 318 Fed. Supp. 720, aff'd C. A. 5, 441 F. 2d 728, cert. den. 404 U. S. 897; *Green v. Wolf Corp.,* 1968, C. A. 2, 406 F. 2d 291, cert. den. 395 U. S. 977. The judgment that was entered was in favor of all members of the plaintiff class (39a-42a). It was not limited to any portion of such class, nor did it require affirmative action on the part of the class member for the rights and disabilities of such a judgment to attach—the right to claim an aliquot share of such judgment, and the disability of being forever barred from instituting another such action. (Certainly petitioners would claim the judgment in this case as a bar against another suit started in the future by a non-claiming class member.) This was clearly recognized by the *en banc* court:

> "• • • If a plaintiff class-member is adjudicated to have an interest in a fund, he has benefited within the meaning of the common fund doctrine (11a).
>
> "The rationale for such a rule is evident, as the case before us indicates. A portion of the judgment won by plaintiffs' attorneys—at least $213 for each unconverted debenture—is due every member of the class. Each plaintiff has a present vested interest in the class recovery, and his share of the judgment may be received on request. It cannot be urged convincingly, then, that the absent plaintiffs have not received a benefit from the litigation" (12a).

Even if a class member had had a right to "opt-out," as under Rule 23(b)(3) F.R.C.P., and failed to exercise it—which is the situation presented to the District Court, Oregon, in a motion concerning attorneys' fees pending in the case mentioned by petitioners at page 8 of their petition, *American Timber & Trading Co. v. First National Bank*—it still would not release him from being bound by the final judgment in the case. This too, the *en banc* court considered and dealt with (11a-12a, n. 14).

Petitioners state (11) that this Court in *Alyeska, supra,* expressly limited *Sprague, supra,* insofar as *"Sprague* suggests a view of the common benefit exception which is broad enough to justify imposing attorneys' fees on the property of a loser or other non-fiduciary of the litigation." This sentence alone illustrates the error in petitioners' reasoning. Respondents have not sought to impose "attorneys' fees on the property of a loser or other non-fiduciary of the litigation." The common fund doctrine as set forth in *Trustees v. Greenough, Sprague v. Ticonic Bank* and *Alyeska, supra,* and the *en banc* court in the case at bar (1a-17a) is that attorneys' fees are paid from the fund recovered through the efforts of plaintiffs' attorneys. Once the fund is recovered it no longer is the property of the "loser." In the case at bar the "loser," Boeing, had a judgment entered against it after trial and appeal. It paid the judgment. No further funds are sought from Boeing—not for costs, not for attorney's fees, not for anything. Attorneys' fees and costs are sought from the judgment award created by respondents' attorneys, which now belongs to the

class. As the *en banc* court below itself stated: "Under today's decision, however, the fees of the attorneys for the class will be deducted from the amount for which Boeing has *already* been held liable. There is no "surcharge" on the defeated litigant" (17a) (Court's italics). Thus, petitioners' usage of "the American Rule" as stated in *Alyeska,* as a basis for persuading this Court to issue a writ of certiorari because of the decision of the *en banc* court below allegedly in conflict therewith, is not in accord with the facts of this case, the decision below, or the law in this country.

POINT II

The decision of the *en banc* Court of Appeals is in accord with judicial standards for awarding fees to attorneys in class actions

The standards followed by the federal courts today in determining fees to attorneys in successful (settlement or judgment on the merits after trial) class action litigations are basically those set forth by the Court of Appeals in the 2nd and 3rd Circuits--*City of Detroit v. Grinnell Corp.,* 495 Fed. 2d 448 (2nd Cir. 1974), and *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp.,* 487 Fed. 2d 161 (3rd Cir. 1973). One of the several criteria there set forth is the amount of the fund recovered. All of these criteria are then considered by the District Court in awarding attorneys fees. Absent an abuse of discretion, judicial supervision of the fee award at the District Court level—which would take into account all the factors present in any one case by a judge familiar with the case—is the only viable solution to the determination of a proper, fair and equitable fee award. Thus, questions concerning time spent, hourly charges, complexity of the litigation, the fund realized, the number of claims presented, set-

tlement or judgment on the merits after trial, *et al.,* would be decided at the trial level within the context of the litigation itself.

Petitioners argument in Point II of the petition is irrelevant to a situation such as the one at bar, since it ignores the fact that a judgment has been entered in favor of the class on whose behalf suit was brought, as an entity (39a-42a).

Petitioner also is intermingling its argument concerning the ultimate disposition of unclaimed portions of the judgment award with its argument concerning one of the bases of attorneys fees, in its Rule 23 FRCP argument in Point II of its petition. The entire judgment award is the fund from which attorneys fees as fixed by the court, is paid, so that thereafter each class member will receive a proportionate share. But the filing of a claim by a class member does not affect the size of the award to him—it is fixed, whether he files or not. Petitioners admit that "Expenses of instituting an action and notifying the class * * *" (13, fn.) are properly payable from the entire judgment award itself. Since this does not make the "loser" bear extra expense contrary to petitioners' use of the "American Rule" here, neither does or should attorneys fees. Even without going into the question of the ultimate disposition of the fund remaining—which has been enunciated but specifically not decided (14a, fn. 17)—there can be no question as to the rights of a class member to avail himself of receiving his proportionate share of the judgment award even after attorneys fees are fixed and paid. If such fees were limited to claims filed at the time fees were awarded, then the later "claimant" would receive more than an earlier claimant. On the other hand, fees based on the entire judgment, would leave an equal (proportionately)

amount for each claim, present or future. Thus fees paid on the entire judgment award are proportionate to the benefits of the case.

Petitioners argument that awarding attorneys fees based (as one of the many criteria for an award) on the entire judgment award in a litigation terminated by judgment on the merits after trial and appellate review, will make "more difficult the settlement of class actions" (14) with their reasons thereafter, reduces itself to a statement that experienced attorneys after settling a case, will require or demand fees based not on the settlement amount, but rather on the *ad damnum* clause of the complaint. This just is not so. In any case, as stated above, judicial supervision of fee awards certainly prevents any inequities.

CONCLUSION

For the reasons set forth above, respondents pray that the petitioners' application that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit sitting *en banc*, be denied

Dated: March 23, 1979.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1327

THE BOEING COMPANY
(formerly The Boeing Airplane Company), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

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(formerly The Boeing Airplane Company), *et al.*,

Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

The respondent class of non-converting holders of The Boeing Company's 4½% convertible subordinated debentures due July 1, 1980, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Second Circuit *en banc*, filed December 27,

1978. That decision, squarely in accord with a long line of decisions of this Court, does nothing more than allow the award of fees out of a common fund.

Question Presented

Should this Court review a decision which determines the source of a fee to be awarded in a unique case where (1) the Petitioner lacks standing; (2) the decision is consistent with a long line of decisions of this Court awarding fees from common funds; (3) liability was based upon New York law under the principles of pendent jurisdiction; and (4) no fee has yet been awarded?

Statute Involved

Section 475 of the *Judiciary Law* of the State of New York (29 McKinney's Consolidated Laws of New York at p. 631) provides:

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

Statement of the Case

Petitioner's statement of the case fails to note that liability was based solely on New York State law on a pendent jurisdiction count. No violation of federal law was found. In *Van Gemert I,* Petitioner was held liable under New York's law of contracts because of its failure to provide debentureholders with reasonable and adequate notice of the redemption of the convertible debentures (4a, 46a-47a, 73a).

As a result, judgment was entered in the District Court in favor of the plaintiff class and against Petitioner in the principal sum of $3,289,359 plus interest at "legal rates fixed by the State of New York" from March 9, 1966 to the date of the judgment (40a). Petitioner thereafter paid the judgment into court for distribution to the class in an aggregate sum in excess of $6,000,000, constituting the total of the principal and interest. The judgment provided that the plaintiffs' attorneys fees to be allowed by the court would be "paid out of said total amount of this judgment."

To date, no fees have been awarded or paid. All that has been determined is that counsel fees are to be charged against the entire judgment fund with the result that both claiming and non-claiming class members will bear their *pro rata* share of the fees.

The Court of Appeals *en banc,* affirmed the District Court holding that the fees and costs of counsel be assessed against the unclaimed, as well as the claimed, portion of a judgment. Its conclusion, the Court stated, was predicated on considerations of equity and sound policy and was sustained as well by longstanding precedent. The Court also stated that to hold otherwise would engender serious unfairness to claiming class members (3a).

Petitioner misreads the decision below by stating that it holds that class action attorneys are to be compensated on the basis of the maximum possible award to the class (Petition at 14). That decision merely held that counsel fees are to be assessed against the entire judgment fund. The decision below had nothing to do with the size of counsel fees, just their source.

Reasons for Denying the Writ

1. Having paid the judgment into court for distribution to the class members, Petitioner has no further claim against the judgment fund and, therefore, lacks standing to seek review concerning the distribution of that fund. When payment was made into Court, each debentureholder acquired title to his *pro rata* share of the fund and, simultaneously, Petitioner lost all interest therein.

2. The payment of fees to be awarded out of the common fund created is an exception to the "American rule" of attorneys' fees embraced by this Court in a line of cases going back to *Trustees* v. *Greenough*, 105 U.S. 527 (1882).

3. Under *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 259, n.31 (1975), when liability is based on state law, as it was here, the determination of counsel fees is also a question of state law. This Court should not concern itself with an analysis of attorneys' liens under New York law.

4. Petitioner advised the panel which decided *Van Gemert II* that this case may be the only securities law class action ever to proceed through trial to a money judgment. Accordingly, the decision below is not of great importance to other litigants or to the public in general.

ARGUMENT

POINT I

Petitioner has no standing to question the award of attorneys' fees out of the judgment fund since it has no interest in that fund.

Having paid the judgment, Petitioner has no further claim whatsoever against the judgment fund since it is vested, *pro rata*, in the class members, both claiming and non-claiming.* *Pennsylvania Railroad Company* v. *United States*, 98 F.2d 893 (3d Cir. 1938); and *Hansen* v. *United States*, 340 F.2d 142 (8th Cir. 1965). Where a party has no recognizable claim of monetary damage or interest, no legal controversy exists and such party lacks standing to litigate. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

In *Pennsylvania Railroad Company* v. *United States*, *supra*, a class action remarkably similar on its facts to this case, judgment had been entered against the Railroad in favor of certain bondholders of a subsidiary. The Railroad paid to trustees the amount of the judgment for distribution to claiming bondholders. Eighteen years after the entry of judgment, with a portion of the fund still unclaimed, the Railroad filed a petition asserting ownership of the remaining funds.

The court held that the Railroad had no legal interest in the funds since title had passed to the bondholders upon deposit of the judgment. The Court said:

> "While the payment was made to a trustee for the bondholders the trustee was a mere distributing

---

* Under New York State law, a judgment can be enforced within twenty years of its entry. Therefore, it will not be known for many years what portion of the judgment fund will ultimately be claimed by class members.

agent and *each of the bondholders acquired title to his pro rata share of the fund.* As the court below pointed out, the situation, so far as the Railroad Company was concerned, was the same as if it had paid its promissory note to a collecting bank which held the proceeds awaiting the call of the payee. The money with which it made the payment was its money until payment. At that moment, however, title passed to the holders of the bonds. Consequently thereafter the Railroad Company had no more title to the money than it would have had if it had used it to pay any other debt." 98 F.2d at 894 (Emphasis added).

Since title to the deposited judgment fund has passed, *pro rata* to the class members, Petitioner has no further right to it and, therefore, lacks standing to litigate questions concerning its distribution.

POINT II

The decision below follows the well established common fund rule and is consistent with *Alyeska.*

Petitioner argues that the decision below conflicts with *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). *Alyeska* does not apply because *Alyeska* did not involve the creation of a common fund.

Where a common fund has been created through the efforts of plaintiffs' attorneys, such attorneys are entitled to an award of fees based upon the entire amount of the fund prior to its distribution. *Trustees* v. *Greenough,* 105 U.S. 527 (1882). In *Greenough,* as in this case, the plaintiff had brought an action on behalf of himself and similarly situated bondholders and succeeded in establishing a fund for the payment of principal and interest due on the bonds. He then sought to collect attorneys' fees and other expenses from the fund created even though not all of the bondholders filed claims. *Id.* at 529.

In supporting payment of attorneys' fees out of the entire fund, claimed and unclaimed, this Court stated:

> "He [the plaintiff] had worked for them [the other bondholders] as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. *To make them a charge upon the fund is the most equitable way of securing such contribution.*" *Id.* at 532 (Emphasis added).

Such a charge upon the common fund is exactly the relief ordered by the Court below which expressly relied upon *Greenough* and its progeny. *Greenough* has been "consistently followed" by this Court. See *Alyeska* at pp. 257-258.

By contrast, no common fund and no monetary recovery whatever were created by the plaintiffs in *Alyeska.* The plaintiffs in *Alyeska* sought a true shifting of the burden of fees from themselves to the defendants. No such shifting of fees to defendants is sought here by plaintiffs' counsel who seek fees only out of the fund they have created.

Since the decision below is squarely within the almost century-old line of precedents beginning with *Greenough,* it does not warrant review by this Court.

This case plainly meets all the established criteria for a common fund as set forth by this Court in *Alyeska.* See the analysis of these criteria as applied to the facts in this case in the decision below at pp. 9a-11a.

POINT III

This Court should not review a decision governed by New York state law.

Judgment was entered in favor of plaintiffs by virtue of the defendants' liability under a pendent New York state claim.* No finding of liability was based on federal law. In *Alyeska,* this Court noted that in diversity actions the question of the award of fees is normally governed by state law. 421 U.S. p. 259, fn. 31.

The decision below is in strict accord with Section 475 of the *Judiciary Law* of the State of New York which provides:

> "From the commencement of an action . . . the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his clients' favor, and the proceeds thereof in whatever hands they may come . . ."

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* In their petition for writ of certiorari, dated September 22, 1975, in *Van Gemert I* (denied at 423 U.S. 947 (1975)), Petitioners stated (at p. 18):

> "Here, the purely state law claim asserted by the Debenture holders as to the adequacy of the notice given them of the call was the very heart of the case from the time it was commenced in 1966 and this claim could have been maintained separately in a state court."

POINT IV

The decision below is not of great importance to other litigation.

Petitioner has described this case as perhaps the only securities class action which has proceeded through trial to a money judgment (Petitioner's brief, dated February 7, 1977 at p. 29, submitted in *Van Gemert II*). Petitioner's statement is buttressed in *Developments—Class Actions,* 89 Harv. L. Rev. 1318, 1373 n.5 (1976), which cites, *inter alia,* the *American Trial Lawyers, Special Committee on Rule 23 of the Federal Rules of Civil Procedure, Report and Recommendation* 15-16 (1972) to the effect that from 1966 to 1972 no antitrust or securities class action had proceeded through trial to actual determination of damages.

This case, therefore, is *sui generis.* Since the decision below is premised upon payment of fees to be awarded from a fund created as a result of a judgment after trial, and not as a result of a settlement, the issues presented are unique to this case and do not warrant the exercise of this Court's jurisdiction.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York
March 27, 1979

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1327

THE BOEING COMPANY
(formerly The Boeing Airplane Company), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONERS

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IN THE

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Respondents.

REPLY BRIEF FOR PETITIONERS

The following reply is submitted by Petitioners, The Boeing Company, *et al.* ("Boeing") solely in response to new matter raised by one of the three briefs for respondents in opposition. Boeing respectfully submits that the claim of the respondents that the issue in this case is not relevant or important to the conduct of class action litigation is erroneous.

ARGUMENT

The Decision of the Court of Appeals Will Significantly Affect the Conduct of Class Action Litigation.

Only one of respondents' three briefs, that of Stuart D. Wechsler, questions the importance of this case to the conduct of class action litigation. Petitioner believes that this Court should be aware of the warmed-over and contrived nature of these contentions.

First, it is argued that this case is unimportant because it is the only securities class action which has proceeded

through trial to a money judgment. In fact, even if one searches only for federal securities class actions in which plaintiff has obtained a money judgment, a substantial number of recent published opinions may easily be found.* Many more unpublished decisions undoubtedly exist.

Moreover, the importance of the Court of Appeals decision is not limited to class actions which result in a judgment after trial. The Court of Appeals expressly recognizes the effects its opinion will have on decisions to bring class actions, 14a ("a ruling for Boeing . . . would deter lawyers from bringing . . . [class action] lawsuits"), and on decisions to settle these actions. 16a-17a.

Second, it is argued that the Court of Appeals decision, which is elsewhere referred to as a "securities class action", Wechsler Brief at 9, is unimportant because it is not based on federal law. This Court will search the Court of Appeals opinion in vain for any such limiting principle or for any reliance on N.Y. Judic. Law § 475 (McKinney 1968). Instead, the Court of Appeals broadly declares "that the fees and costs of counsel may be assessed against the unclaimed portion of [any] class action judgment." 3a.

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* *E.g., Monsen* v. *Consolidated Dressed Beef Co.*, 579 F.2d 793 (3d Cir.), *cert. denied*, 99 S. Ct. 318 (1978); *Gould* v. *American-Hawaiian S.S. Co.*, 535 F.2d 761 (3d Cir. 1976); *Sanders* v. *John Nuveen & Co.*, 524 F.2d 1064 (7th Cir. 1975), *vacated and remanded*, 425 U.S. 929 (1976); *Swanson* v. *American Consumer Industries, Inc.*, 517 F.2d 555 (7th Cir. 1975); *Sharp* v. *Coopers & Lybrand*, 457 F. Supp. 879 (E.D. Pa. 1978); *Smithkline Corp.* v. *Eli Lilly & Co.*, 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 99 S. Ct. 123 (1978); *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112 (S.D.N.Y. 1974), *modified*, 540 F.2d 27 (2d Cir. 1976); *Elkind* v. *Liggett & Myers, Inc.*, CCH Fed. Sec. L. Rep. ¶ 96,602 (S.D.N.Y. 1978); *Adams* v. *Standard Knitting Mills, Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,683 (E.D. Tenn. 1976); *Del Noce* v. *Delyar Corp.*, CCH Fed. Sec. L. Rep. ¶ 95,670 (S.D.N.Y. 1976).

Another dozen securities class action decisions have recently been published in which the defendant has prevailed.

The opinion is based squarely on federal law and *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). 7a-11a. It represents a substantial expansion of Fed. R. Civ. P. 23.

Third, it is claimed that Boeing has no standing to question an award of attorneys' fees. In essence, this Court is asked to decide that Boeing does not have even a colorable claim to funds which are ultimately unclaimed by the class, a subject on which the Court of Appeals expressly "intimate[d] no view", 14a n.17, and hence that Boeing has no interest in the siphoning off of those funds by plaintiff's attorneys. This argument was too insubstantial to merit discussion by the Court of Appeals. Boeing has a strong claim, which it intends to vigorously pursue, to unclaimed funds in this action.*

CONCLUSION

Both because of the important effect of this decision on class action litigation, and because the decision materially alters the American Rule on attorney's fees as set forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals (*en banc*).

Dated: New York, New York
April 6, 1979

Respectfully submitted,

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* *See, e.g., Willametz* v. *Susi*, 489 F.2d 364, 366 (1st Cir. 1973); Uniform Class Actions Act § 15(c)(5) & (6) in 12 Uniform Laws Annotated (Cum. Supp. 1978); Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1521, 1527 (1976).

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1327

THE BOEING COMPANY

(formerly The Boeing Airplane Company), *et al.*,

Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit *en banc,* reported at 590 F.2d 433 (2d Cir. 1978), is set forth in the Appendix hereto at 1a. The opinion of the panel, reported at 573 F.2d 733 (2d Cir. 1978) (*"Van Gemert III"*), is set forth in the Appendix hereto at 27a. The orders of the District Court dated June 30 and September 22, 1977, which were affirmed by the Court of Appeals *en banc,* are set forth in the Appendix hereto at 39a and 43a. The opinions of the Second Circuit on the previous appeals in this action are reported at 553

F.2d 812 (2d Cir. 1977) (*"Van Gemert II"*) set forth in the Appendix hereto at 45a, and 520 F.2d 1373 (2d Cir.), *cert. denied,* 423 U.S. 947 (1975) (*"Van Gemert I"*) set forth in the Appendix hereto at 53a. Also included in the Appendix at 85a is a May 11, 1978 opinion of the District Court denying interim attorneys' fees to the respondents. None of the other opinions of the District Court other than its opinion certifying the action as a class action, 259 F. Supp. 125 (S.D.N.Y. 1966), is reported.

Jurisdiction

The judgment of the Court of Appeals *en banc* was entered on December 21, 1978. The mandate of the Court of Appeals was stayed by order dated February 23, 1979. The petition for writ of certiorari was filed February 26, 1979, and that petition was granted by order entered May 14, 1979. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Statutes Involved

62 Stat. 955, 28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees and exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title.
>
> A bill of costs shall be filed in the case, and, upon allowance, included in the judgment or decree.

68 Stat. 253, 28 U.S.C. § 1923 provides:

> (a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
>
> $20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;
>
> $20 in admiralty appeals involving not over $1,000;
>
> $50 in admiralty appeals involving not over $5,000;
>
> $100 in admiralty appeals involving more than $5,000;
>
> $5 on discontinuance of a civil action;
>
> $5 on motion for judgment and other proceedings on recognizances;
>
> $2.50 for each deposition admitted in evidence.
>
> (b) The docket fees of United States attorneys shall be paid to the clerk of court and by him paid into the Treasury.
>
> (c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:
>
> $25 where the amount involved is not over $1,000;
>
> $50 where the amount involved is not over $5,000;
>
> $75 where the amount involved is over $5,000.

The Rules Enabling Act, 80 Stat. 1323, 28 U.S.C. § 2072 provides:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United

States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Question Presented

Does the American Rule on attorneys' fees, as defined in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), permit an award of attorneys' fees in class actions to prevailing class action attorneys which award of fees is taken not only from money actually claimed by their client class members, but also from money that belongs to others, as sanctioned by the Court of Appeals in this case?

Statement of the Case

The issue presently before this Court is the most recent issue to arise in a class action which commenced in 1966 and has resulted in four published opinions of the Court of Appeals for the Second Circuit. To understand the context in which the issue here presented arose and in which the Court of Appeals *en banc* reached such an anomalous result, a brief outline of the procedural history of the litigation is set forth.*

Van Gemert I

Respondents are the representatives of a class of holders of convertible bearer debentures of the petitioner Boeing Company ("Boeing") who, when Boeing called the debentures for redemption pursuant to the contract (the indenture) under which the debentures were sold, failed to convert them into shares of Boeing common stock before the expiration of the conversion privilege.** The class was represented by three separate law firms, each of which now seeks attorneys' fees. After trial on both federal securities law and state law claims, the District Court held that Boeing had met all the notice requirements of the indenture and hence was not liable for the failure of the class to convert the debentures into common stock.

On appeal from the judgment dismissing the complaint, the Court of Appeals in *Van Gemert I* agreed that Boeing

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* A more detailed procedural history may be found in the panel and *en banc* opinions of the Court of Appeals. Appendix at 1a and 27a.

** At the time of the call for redemption, the two shares of Boeing stock into which each $100 in principal amount of debentures was convertible were worth $316.25. The redemption value of the debentures was $103.25. Hence, holders who failed to convert before expiration of the conversion privilege could claim damages of $213 for each $100 in principal amount of debentures. Appendix at 3a, 40a.

had given all notice required by the indenture. That court held, however, that Boeing should have given even more notice because the debentureholders had an implied right to expect more notice than the indenture specified. Appendix at 73a. The Court of Appeals did not hold that Boeing engaged in any fraud or that Boeing had in any way profited as a result of its decision, which had been based on two opinions of counsel, not to provide the additional notice to which the Court of Appeals felt the class had an implied right.* The Court of Appeals simply held that Boeing was liable for the profit that the class could have made if each class member had converted the debentures into common stock and sold the common stock at prevailing market prices. Appendix at 77a.

Van Gemert II

On remand, the District Court fixed the profit that would have been produced by the timely conversion of each debenture and set the method of calculating attorneys' fees. The respondents appealed again, arguing, in relevant part, that class members filing claims for damages should be allowed to divide on a *pro rata* basis the amount which might have been, but was not, claimed by class members, if only for the purpose of paying attorneys' fees. The Court of Appeals in *Van Gemert II* held that class members filing damage claims had no right to unclaimed profits for any purpose, including paying attorneys' fees in whole or in part. The Court reasoned that such an award would constitute a fluid class recovery or one benefiting a "next best class", which was contrary to the Court of Appeals' holding in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). Appendix at 51a-52a.

* Indeed, the Court of Appeals stated that the only beneficiaries of Boeing's action were "the corporate stockholders [who] benefited by not having their stock watered down by the number of shares necessary to convert [the class's] debentures." Appendix at 77a.

Van Gemert III

On remand from *Van Gemert II*, the District Court entered an order requiring Boeing to deposit in escrow an amount equal to the maximum amount the class could claim in an account at the Chase Manhattan Bank to be "held in escrow" and disbursed under the auspices of a Special Master, as directed by the District Court. Appendix at 41a-42a. The escrow account today contains over $6,500,000. Members of the class have filed claims for damages of approximately $2,000,000.* Since *Van Gemert II*, it has been undisputed that funds deposited pursuant to the order of the District Court which remain unclaimed do not belong either to claiming class members or to the class as an undifferentiated whole. *Van Gemert II*, Appendix at 51a-52a.

The District Court also ordered that even though claiming class members could not directly invade the sums remaining unclaimed in order to pay their attorneys' fees, as *Van Gemert II* had held, these funds could be used to pay the attorneys' fees of the class. Equal shares of the profits lost on each debenture, whether claimed by a class member or not, would be deducted to pay the class attorneys. Appendix at 40a-41a. Boeing appealed from this aspect of the District Court's order as contrary to the decision in *Van Gemert II*.

In *Van Gemert III*, a panel of the Court of Appeals reversed the District Court's order that attorneys' fees could be paid from unclaimed funds. The panel held that under the American Rule on attorneys' fees, as defined by this

* The class attorneys have also requested fees totaling $2,000,000.

Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), attorneys' fees could only be paid from the shares of those class members who actually claimed damages and therefore actually received a benefit from their attorneys' actions. Because the unclaimed money belonged to others for whose benefit the litigation had not been brought, attorneys' fees could not be charged against it. Appendix at 29a, 33a-34a.

The *En Banc* Decision

Respondents filed a petition for rehearing *en banc.* That petition was granted and the issue was considered by the entire Court. The Court of Appeals *en banc,* by a divided vote, affirmed the District Court and held that class action attorneys could be paid fees not only from money actually claimed by their client class members but also from money that did not belong to the class because it was never claimed. Appendix at 3a. Three grounds were stated for the decision.

First, the majority stated that a contrary decision would be inequitable to claiming class members and their lawyers "without any corresponding benefit to absentees." *Id.* Since the unclaimed money, irrespective of ownership, is nevertheless "the spoils of . . . victory," those "spoils" could be used to pay attorneys' fees. *Id.* at 11a n.14. Second, the Court reasoned that a contrary decision would not be "sound policy" because it would "place enormous pressure on attorneys [for a class] to settle." *Id.* at 3a. Third, "long-standing precedent" was said to support the decision. *Id.*

The three dissenting judges stated that the majority had "allowed [its] enthusiasm for class litigation to lead them into approving an award to attorneys that cannot be justified." *Id.* at 17a. The dissenting judges saw nothing in the case which "justifie[d] an award of substantial fees to

lawyers for work purportedly performed on behalf of persons who are not their clients and who, themselves, have not received a single penny as a result of the lawyers' efforts." *Id.*

Summary of Argument

The American Rule generally provides that a prevailing litigant must pay his own attorneys' fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 247 (1975). Under the corollary "common benefit" doctrine, the financial burden of a lawsuit can be spread among unnamed parties for whose benefit the suit was brought *and* who were actually enriched by the results obtained. *Trustees* v. *Greenough,* 105 U.S. 527 (1882); *Central Railroad & Banking Co.* v. *Pettus,* 113 U.S. 116 (1885). This common benefit doctrine only applies when the beneficiaries of a lawsuit are "small in number and easily identifiable," when the benefits can be "traced with some accuracy" to the identified beneficiaries, and when there is "reason for confidence that the costs [can] indeed be shifted with some exactitude to those benefiting." *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 264 n.39.

There is no dispute that the amount of damages claimed by class members in this action, which now exceeds $2,000,000, constitutes a common benefit from which the class attorneys may be paid fees. A majority of the Court of Appeals *en banc,* however, also held that potential damages that are never claimed constitute a common benefit from which attorneys' fees may be deducted. The *en banc* majority made two fundamental errors in reaching this conclusion.

First, even assuming that some kind of obscure and amorphous "benefit" accrued to the non-claiming class mem-

bers from the unclaimed funds in this case, it was certainly not sufficiently real to satisfy the requirements set forth in *Alyeska* for a grant of attorneys' fees out of those funds. The *en banc* majority created a chimerical "benefit" in non-claiming class members solely for the purpose of assessing attorneys' fees. Thus, the word "benefit" was used but it was stripped of all meaning.

The "long-standing precedent" which the *en banc* majority claimed supported its decision consists of two cases, *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), and *Trustees* v. *Greenough,* 105 U.S. 527 (1882), neither of which dealt with the issue before this Court and both of which were *explicitly* disavowed by this Court, insofar as they might be construed to address this issue, in *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 257-58 & n.30.

The *en banc* majority also avoided the *Alyeska* requirements that such beneficiaries as there are must be identifiable and that the benefits and costs must be shifted to them with some accuracy. Here it is clear that benefits will not be paid to, and costs will not be paid out of those benefits by, non-claiming class members, because no one knows who they are.

The *en banc* majority's second fundamental error lies in even using a common benefit analysis to determine whether attorneys' fees could be paid from potential damages to non-claiming members of a class. *Alyeska* and this Court's other common benefit cases, none of which were class actions, assume that some kind of benefit has been created. Some lower courts have used the common benefit rationale in class action settlement situtations, in which it is also clear that a benefit—the negotiated settlement fund —has been created. In fully litigated class actions, however,

under Rule 23 of the Federal Rules of Civil Procedure and decisions thereunder, a benefit has *not* been established when a defendant is held liable to a class. Instead, consistent with this Court's admonition that (with exceptions set forth in Rule 23) class actions are governed "by the same standards that govern . . . other types of litigation." *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 470 (1978), lower courts have held that a defendant may not be assessed damages in favor of the class as a whole, but rather that each individual class member must claim his own damages before judgment for that amount will be taken in his favor. *See, e.g., Kline* v. *Coldwell, Banker & Co.,* 508 F.2d 226, 238 n.8 (9th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975). Because judgment in favor of an unnamed class member awaits his claim for damages, the benefit out of which attorneys' fees can be taken consists only of the amount claimed by class members. *United States* v. *Imperial Irrigation District,* 595 F.2d 525, 530-31 (9th Cir. 1979).

Finally, the policies underlying class actions support the grant of attorneys' fees to class attorneys only from funds actually claimed by the class. Such a holding will protect class actions which compensate individuals for injuries and injustice felt and suffered while limiting class actions which benefit only the attorneys who bring them. Moreover, such a holding will give class attorneys the incentive to diligently search for, and thus bring a real benefit to, the class members who are supposed to be their clients.

ARGUMENT

POINT I

Any "Benefit" Non-Claiming Class Members May Have From Unclaimed Funds in This Action Is Wholly Ephemeral and Not Enough for Attorneys' Fees to Be Paid From These Funds Under the American Rule.

The *en banc* majority of the Court of Appeals in this case recognized that the American Rule on attorneys' fees and the "common benefit" corollary thereto, as set forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), were central to the resolution of the question before the Court. Appendix at 7a. In applying these principles to unclaimed funds, however, the *en banc* majority misapplied this Court's precedents as well as the rationale underlying the common benefit doctrine. The prior decisions of this Court compel the conclusion that, in class actions, attorneys' fees can be collected from the amount which class members have actually claimed, but not from amounts which class members could have, but did not, claim.

A. The American Rule

Since the early days of this Republic, it has been the usual rule that, in the absence of specific legislation to the contrary, each party to a litigation, no matter who wins, pays his own attorney. *See Arcambel* v. *Wiseman,* 3 U.S. (3 Dall.) 306 (1796). The rationale of this rule, which is presently codified as 28 U.S.C. §§ 1920 and 1923, and is set forth at pages 2-3, *supra,* is that the specter of paying attorneys' fees for both sides could deter the assertion of meritorious claims or defenses. As this Court has said: "since litigation is at best uncertain one should

not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 718 (1967). This long-honored rule and its rationale were recently and explicitly reaffirmed in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 247, 271 (1975). The rule, therefore, is that fees will not be shifted from one party in litigation to another.

While the American Rule precludes the imposition of a winner's attorneys' fees on the loser of a lawsuit, the Rule has recognized that a litigant who gains benefits not only for himself, but also on behalf of others, can force them to contribute to his expenses. The "common fund" or "common benefit" doctrine* allows the financial burden of litigation to be spread among unnamed parties for whose benefit the suit was brought and who were actually enriched by the results obtained. This corollary is based on the venerable common law principle of unjust enrichment. *Trustees* v. *Greenough,* 105 U.S. 527, 532 (1882); *Central Railroad & Banking Co.* v. *Pettus,* 113 U.S. 116, 127 (1885); *see* Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 Harv. L. Rev. 1597, 1597-1603 (1974). It requires that "the interests of litigants and [beneficiaries] [be] so closely interlocked that success in the litigation inevitably [brings] evident and measurable gains to the [beneficiaries]." Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 Harv. L. Rev. 1597, 1652 (1974) (referring to *Greenough* and *Pettus*). *Accord, American Association of Marriage & Family Counselors, Inc.* v. *Brown,* 593 F.2d 1365, 1369 (D.C. Cir. 1979).

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* The broader term "common benefit" will be used herein. The term "common fund" is often used when the benefit obtained takes the form of a fund. The rationale supporting an award of attorneys' fees is the same under either term.

Trustees v. *Greenough,* for example, involved the protection of a trust fund set up to pay the principal and interest on a bond issue. One of the bondholders recovered assets for the fund which he and 11 other identifiable bondholders equally shared. After the plaintiff's success, payments, some of which had been missed, could again be made on the bonds as scheduled. At the time of this Court's decision, some bondholders had already asked for their missed payments, and others exercised their right under the bond issue to continue getting interest on the entire amount of their principal while retaining the right to have that principal paid at some time in the future. 105 U.S. at 531. But all would eventually be paid exactly what was due on their bonds because the fund set up to make those payments had been saved and an indefeasible right of each bondholder to an equal share of the trust fund had been protected. This Court, therefore, awarded attorney's fees to the plaintiff from the fund, because in this way the cost of the suit would be spread proportionately among all those who concretely benefited from it. The "favorable decree [had given] them all a proportionate advantage," 105 U.S. at 534, and so to force the plaintiff to bear the entire cost of the suit would unjustly enrich the other bondholders.

In *Central Railroad & Banking Co.* v. *Pettus,* one creditor established a lien on certain assets of the debtor, to the benefit of himself and a number of other creditors. This Court, however, did not grant attorneys' fees from the entire pool of assets recovered, because under the common fund doctrine fees could only be collected from creditors who "participated in the benefit" of the action, 113 U.S. at 125. This Court thus held that plaintiff's attorneys' fee could only be taken from the amount of claims actually "filed in the cause." 113 U.S. at 127. In this way both the amount of the benefit and the identity of the beneficiaries was made certain.

B. Clarification of the Rule in the *Alyeska* Case

The *Greenough-Pettus* rationale for and application of the common fund doctrine was reaffirmed and clarified in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). Plaintiffs in *Alyeska* argued, as does the *en banc* majority here, that a public "benefit" that does not accrue to anyone in particular, but rather benefits society in general, such as the enforcement of beneficial environmental legislation, is enough to shift the burden of attorneys' fees from the winners to the losers and other nonbeneficiaries of litigation. This evasion of the American Rule, which was sometimes referred to as a separate "private-attorney-general rationale," 421 U.S. at 274 (Marshall, *J.,* dissenting), and sometimes as a "generous construction [of] the common-benefit exception," *id.* at 275, was based on expansive dicta in *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939),* and had been adopted in a number of lower court cases, *see* 421 U.S. at 270 n.46. *See also* Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 Harv. L. Rev. 1597, 1609-10 (1974).

In *Alyeska,* this Court rejected the expansive use to which *Sprague* had been put. It was recognized that:

> "Sprague . . . . might be read as suggesting that the Court in *Greenough* said that a federal court could tax [attorneys' fees] against the losing party . . . . But any such suggestion is without support either in the opinion in *Greenough,* which is limited to a common-fund rationale, or in [any federal] statute."

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* The argument that *Sprague* should be read broadly to allow attorneys' fees to be charged to those not enriched by the litigation was strenuously urged to this Court in *Alyeska. See* Brief for Respondents at 3, 4, 36, 37, 38, 72, 81, 88-89; Brief of the Lawyers' Committee for Civil Rights Under Law *Amicus Curiae* at 5, 9, 10, 11.

421 U.S. at 258 n.30. Thus, this Court limited *Sprague* to its holding, which is perfectly consistent with prior common benefit cases, that because the plaintiff had established the indefeasible right of 14 other identifiable trust funds as well as her own to certain assets of a bank, she could obtain attorneys' fees from those assets. This Court in *Sprague* was not faced, as it is in the instant case, with the claim that attorneys' fees should be taken in the name of unidentified individuals who got no tangible benefit from the litigation.

This Court in *Alyeska* concluded that the "expanded version of the common-fund approach to the awarding of attorneys' fees" proposed by the plaintiffs was "ill-suit[ed]" to the rationale and precedents of this corollary to the American Rule. 421 U.S. at 264 n.39. This Court then set forth the unifying characteristics of cases that do fall within the common benefit doctrine: first, the classes of beneficiary should be "small in number and easily identifiable"; second, the benefits should be able to be "traced with some accuracy"; and third, there should be "reason for confidence that costs [can] indeed be shifted with some exactitude to those benefiting." 421 U.S. at 264 n.39.

C. Application of the *Alyeska* Criteria to This Case

The *en banc* majority of the Court of Appeals in this case used *Sprague* and *Greenough* to expand the common benefit doctrine in exactly the way that this Court forbade in *Alyeska*. While here the unidentifiable "beneficiaries" are non-claiming class members rather than the general public, the *Alyeska* rationale applies *a fortiori*, because the benefits which non-claiming class members gain from money they never see are far more illusory than the public's benefit from the *Alyeska* litigation. Application of the *Alyeska* criteria to the facts of this case demonstrates that whatever

benefit may derive from unclaimed funds is insufficient to meet those standards.

First, *Alyeska* requires that the recipients of a benefit be "easily identifiable."* The reason for this requirement has recently been succinctly stated by the Ninth Circuit:

> "Ready identifiability is required to ensure clear, concrete evidence that the feeseeker's efforts produced actual benefits to others, and that fees are assessed only against beneficiaries—those who would be unjustly enriched by not sharing in the cost of producing the benefit—and not against persons whose positions are not substantially bettered because of the victorious lawsuit."

United States v. *Imperial Irrigation District*, 595 F.2d 525, 530 (9th Cir. 1979). If the "identity of persons benefited" cannot be ascertained because, for example, "no records have been maintained" that reveal such information, this first requirement of *Alyeska* cannot be satisfied. *Burroughs* v. *Board of Trustees*, 542 F.2d 1128, 1132 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

In the instant case, the "benefit" in dispute is the amount of potential damages that is *never* claimed by class members. These funds indisputably do not belong to claiming class members or to the class as a whole. *Van Gemert II*, Appendix at 51a-52a. The *en banc* majority therefore held that it was the non-claiming class members who "benefited" from unclaimed funds. These non-claiming class members, however, are not identifiable as *Alyeska* requires. Class members in this case can be identified only if they submit claims, because the type of debentures that they bought—

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* For purposes of Fed. R. Civ. P. 23, this Court held in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) that class members were identifiable if their "names and addresses may be ascertained."

bearer debentures—has no indication of ownership. Thus, records identifying non-claiming class members are and always have been non-existent. The Court of Appeals' statement in its *en banc* opinion that the identification requirement of *Alyeska* is satisfied because each debenture "bears an explicit number" is meaningless because these numbers are not linked to the names of any debentureholders.

The second requirement of *Alyeska* is that it must be possible for the benefits to be "traced with some accuracy." The *en banc* majority purports to satisfy this requirement by stating that it requires only "elementary arithmetic" to distribute the benefits among the explicitly numbered debentures, but again this explanation begs the question. No one knows where the debentures of non-claiming class members are or who owns them, and it is only with such knowledge that benefits can be traced to a beneficiary.

Finally, *Alyeska* requires "reason for confidence that the costs [can] indeed be shifted with some exactitude to those benefiting." 421 U.S. at 265 n.39. This requirement is the purpose for the first two requirements, for only if one knows who the beneficiaries are and by how much each is benefiting, can one spread the costs of the suit among them "with some exactitude." In the instant case, such exactitude does exist as to claiming class members and the claimed funds that they benefit from. As to non-claiming class members, however, not only is there a lack of "confidence" that the costs of this suit will be shifted to them in proportion to their "benefit" from the unclaimed funds at issue, but there is an utter certainty that such a matching of cost and benefit will not take place under the *en banc* majority's rationale, which allocates these costs *pro rata* to claimed and unclaimed funds alike. At the very least it is clear that the benefit to claiming class members, which

consists of money in their pockets, is of a different order of magnitude from the "benefit" to non-claiming class members, which consists of an "interest" in unclaimed funds that is never realized and that vanishes after attorneys' fees are calculated. *See American Association of Marriage & Family Counselors, Inc.* v. *Brown,* 593 F.2d 1365, 1369 (D.C. Cir. 1979). Only if plaintiff's attorneys' fees are taken solely from funds claimed by class members can the three *Alyeska* criteria be satisfied in this case.

POINT II

There Can Be No Benefit to Non-Claiming Class Members From This Action, and Hence No Payment of Attorneys' Fees Under the American Rule Out of Funds That Might Have Been Claimed by Them, Because No Judgment Against Boeing for Their Damages Exists in the Absence of a Claim.

It has been seen that the *Greenough-Pettus* rationale for the common benefit doctrine, as reaffirmed in *Alyeska,* forbids the grant of attorneys' fees from unclaimed funds in this case. These cases proceeded on the implicit assumption that *some* benefit was created and divided among beneficiaries. The concern of those courts was whether the benefit was tangible enough to justify an award of attorneys' fees. An alternate ground for this Court's decision, however, is that *no* benefit has been created from unclaimed funds in this action. This ground arises from the nature of a fully litigated class action. In such actions, unlike the more numerous settlement situations,*

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* In a settlement context, different considerations apply because the parties may agree to the ultimate disposition of the settlement fund, subject to court approval. *See, e.g., Beecher* v. *Able,* 575 F.2d 1010, 1016 n.3 (2nd Cir. 1978).

each class member must claim his own damages before judgment for that amount will be taken in his favor. Hence, the common benefit produced by the class attorneys, from which they may be awarded fees under the American Rule, consists only of the amount claimed by class members.

A. Class Actions Can Only Compensate Individual Injuries

The limited purpose of a civil action for damages is to compensate an individual who has been injured to the extent of his injury. *See Illinois Central Railroad Co.* v. *Crail,* 281 U.S. 57, 63 (1930); *United States Steel Products Co.* v. *Adams (The Steel Trader),* 275 U.S. 388, 391 (1928); C. McCormick, *Handbook on the Law of Damages* § 137 (1935).* This is equally true of class actions brought under Rule 23 of the Federal Rules of Civil Procedure. *See* Advisory Committee Note to Rule 23, 39 F.R.D. 69, 98-107 (1966) (all examples involve compensation to individual class members).

Even if the framers of Rule 23 had wanted it to have a more expansive mandate, they could not have given class actions any scope beyond that of the underlying substantive cause of action because Rule 23 was enacted under the purely procedural authority of the Rules Enabling Act, 28 U.S.C. § 2072, which provides that no rule promulgated thereunder shall alter any substantive right. *See Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 433 n.5 (1956); *United States* v. *Sherwood,* 312 U.S. 584, 589-90 (1941).

* A request for punitive damages, or for damages under a particular statute with an expressly punitive purpose, may serve other ends, but no such complications are involved in this case. Damage actions cannot be justified on the theory that plaintiff is benefiting the common weal as a "private attorney general" after *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). *See, e.g., Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F.2d 674, 694-95 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976).

What Rule 23 can and does do is to "achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Advisory Committee Note to Rule 23, 39 F.R.D. 69, 102-03 (1966). Outside the special procedural rules which allow such actions to proceed, class actions are governed "by the same standards that govern . . . other types of litigation." *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 470 (1978).

In *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), for example, plaintiffs argued that this Court should adopt various special procedures not sanctioned by either Rule 23 or due process because of the special nature of class actions. This Court refused. Instead, it was held that individual notice of a class action must be sent to all class members who could be identified through reasonable effort and that the cost of this notice could not be shifted to a defendant through use of a preliminary hearing. In so holding, this Court adopted the Advisory Committee's Note to Rule 23, which describes such notice as "not merely discretionary" but rather "designed to fulfill requirements of due process to which the class action procedure is of course subject." 39 F.R.D. at 107, *quoted in Eisen* v. *Carlisle & Jacquelin, supra,* 417 U.S. at 173. This Court recognized that "substantial prejudice" to defendant could result if "the traditional rules and procedures applicable to civil trials" were abandoned. 417 U.S. at 178.

Eisen is only illustrative. In fact, this Court has consistently held that class action parties and their attorneys have no special status. Apart from the terms of Rule 23, they are bound by the same requirements as are other parties to other civil suits. Class members, for example, may not aggregate their claims to satisfy a jurisdictional

amount requirement, *Snyder* v. *Harris,* 394 U.S. 332 (1969), and any class member whose individual claim does not reach this jurisdictional amount must be dismissed from the class, *Zahn* v. *International Paper Co.,* 414 U.S. 291 (1973). The notice that *Eisen* requires to be given to class members must normally be borne by the class, *Oppenheimer Fund, Inc.* v. *Sanders,* 437 U.S. 340 (1978). Moreover, the assertion of class action status does not eliminate traditional doctrines of appealability. *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478 (1978); *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978).

Thus, while certain procedural requirements of civil actions are changed by Rule 23, this Court has repeatedly held that the substantive requisites of sustaining a claim against another party in litigation remain unchanged. One of these requisites is that the fact of individual injury must be shown before recovery. In the absence of this requirement, class action defendants would be faced with the abstract statistical claims of anonymous crowds, and not with the specific human losses that are supposed to set our system of justice in motion. *See In re Hotel Telephone Charges,* 500 F.2d 86, 91-92 (9th Cir. 1974).

B. Class Action Judgments for Damages Are Not Final Until Individual Damages Are Claimed

From this Court's emphasis that the purpose of class actions is to compensate individuals, and that the differences between class actions and other actions are limited to those procedural variations set forth in Rule 23, it follows that judgments in fully litigated class actions for damages are not final until individual damages have been claimed and proved.

In a non-class civil action for damages, this principle is too plain for argument. The act of filing a complaint in-

volves an individual demand for relief. A complaint is defective if it lacks such a claim. *E.g. RKO-Stanley Warner Theatres, Inc.* v. *Mellon National Bank & Trust Co.,* 436 F.2d 1297, 1304 (3d Cir. 1970). It is not enough for a plaintiff to prove that a defendant has violated the law. Plaintiff must show that *he* has been injured in some amount by that violation. *See Palmer* v. *Connecticut Railway & Lighting Co.,* 311 U.S. 544, 561 (1941); *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 562 (1931); *Simon* v. *New Haven Board & Carton Co.,* 516 F.2d 303, 306 (2d Cir. 1975); *Terrell* v. *Household Goods Carriers' Bureau,* 494 F.2d 16, 23-24 (5th Cir.), *petition for cert. dismissed,* 419 U.S. 987 (1974). The burden cannot be shifted to force a defendant to show that a plaintiff was not injured. *Gottesman* v. *General Motors Corp.,* 436 F.2d 1205, 1210 (2d Cir.), *cert. denied,* 403 U.S. 911 (1971).

In class actions, the requirement that individual damages be claimed* is left until the end of the case so that the liability *vel non* of the defendant may be established in the least costly and most efficient way. *In re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 282 (S.D.N.Y. 1971). This requirement, however, has not and could not be eliminated entirely.

Abundant evidence of this need for individual proof of damage exists in the refusal by lower courts to certify class actions when:

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* In the instant case, there is little difference for a class member between a claim of injury and proof of injury. Because damages are so easy to calculate, all a class member need do is show that he owned Boeing's debentures at the appropriate time to establish his damages. The additional complexities of cases in which proof of injury or damages are more difficult need not be discussed here. Because proof of damage is required, however, it follows *a fortiori* that the mere claim of damage necessary in this case is also required.

> "[i]t is readily apparent that no matter how easy it is to establish damages on a class level . . . it is extremely difficult or almost impossible to distribute these sums to their rightful recipients."

City of Philadelphia v. *American Oil Co.*, 53 F.R.D. 45, 72 (D.N.J. 1971). *See Windham* v. *American Brands, Inc.*, 565 F.2d 59, 66, 72 & n.40 (4th Cir. 1977) (*en banc*), *cert. denied*, 435 U.S. 968 (1978); *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 236 n.8 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) ("It has been suggested that generalized proof of damages might suffice under Rule 23. But the rule does not eliminate the ultimate need for individual proof of damages by each member of the class.") *In re Hotel Telephone Charges*, 500 F.2d 86, 89-90 (9th Cir. 1974); *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1112-14 (2d Cir. 1973) (Medina, *J.*), *vacated and remanded on other grounds*, 417 U.S. 156 (1974); *In re Independent Gasoline Antitrust Litigation*, 79 F.R.D. 552, 561-62 (D. Md. 1978); *Lohse* v. *Dairy Commission*, 25 Fed. R. Serv. 2d 1018, 1020-22 (D. Nev. 1977); *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589, 600 (N.D. Ill. 1973). Some of these decisions have rested on the ground that the fact of injury cannot be tried on a class-wide basis without violating the Rules Enabling Act. *E.g.*, *Windham* v. *American Brands, Inc.*, *supra*, 565 F.2d at 66. Others have held that such abrogations of the requirement of showing individual injury as the concept of "fluid recovery" do not afford defendant due process, *Eisen* v. *Carlisle & Jacquelin*, *supra*, 479 F.2d at 1018.* All have concluded, however, that individual damages must be claimed by individual class members before a defendant's

* While Judge Medina's opinion for the Second Circuit in *Eisen* is not specific as to what due process requires in this situation, we submit that it requires at least that a defendant be shown to owe specific damages to a specific injured person, not to society in the abstract, before judgment can be had against him for that amount.

liability for that amount comes into being, and therefore that a defendant cannot be liable to a class for a "fluid recovery" in which damages are calculated only as a gross amount payable to the class as a whole. *See In re Hotel Telephone Charges*, *supra*, 500 F.2d at 90. Indeed in this very case, and unchallenged either before the *en banc* Court of Appeals or before this Court, is a decision reaffirming the Second Circuit's refusal to allow a "fluid" transfer of unclaimed funds to the class. *Van Gemert II*, Appendix at 51a-52a.

These decisions are unanimous in their recognition that the class action is "a multi-party device on which each class member must step forward to claim his own damages" before those damages will be assessed against a defendant. Gordon, *Manageability Under the Proposed Uniform Class Actions Act*, 31 Sw. L. J. 715, 725 (1977). Final judgment in favor of a particular unnamed plaintiff in a class action, and against a particular defendant, therefore awaits assertion of the plaintiff's claim. Rule 23, to allow the class claim to be asserted without undue expense, has allowed all but this last essential element to be tried without the claimant's participation and without any cost to him, beyond that required to assert his claim. *See Eisen* v. *Carlisle & Jacquelin*, *supra*, 479 F.2d at 1010. Injury must finally be asserted, however, before a class member can recover.

From the fact that there is as yet no final judgment in favor of any non-claiming class member in the instant case, it follows that the common benefit from which plaintiff's attorneys can levy attorneys' fees consists only of the amount so far claimed by the class. Only after the time for filing individual claims has run will the final amount of damages actually involved, and hence the maximum amount of the benefit, be known. *See United States* v. *Imperial Irrigation District*, 595 F.2d 525, 530-31 (9th Cir.

1979). Because unclaimed funds are not part of a common benefit, but are only temporarily in an escrow account pending the approval of claims,* class attorneys cannot be awarded fees from that money under the American Rule on attorneys' fees.

POINT III

This Court's Refusal to Award Fees From Unclaimed Funds Would Protect Meaningful Class Actions While Discouraging Abuses.

It has been shown above that, in the absence of statutes not involved here, class actions for damages have as their proper purpose the compensation of individual injuries. An allowance of fees to class attorneys only from funds claimed by class members cannot discourage class actions brought for this purpose. The instant case, for example, would certainly not have been discouraged, and the over $2,000,000 so far claimed by the class is enough to ensure that no class attorney will be uncompensated. The only kind of action that

* The District Court entered an order requiring Boeing to pay into an escrow account the maximum potential damages of the class, with the claims on that fund being administered by a special master. Appendix at 41a. This order was a procedural device. The District Court did not purport to rule, nor could it have ruled consistent with Rule 23 and due process, that Boeing was liable for that amount. It only calculated, based on its holding concerning the damages attaching to each debenture, the maximum amount for which Boeing might be held liable.

The deposit of money in escrow does not alter the ownership of that money. *See, e.g., Press* v. *Marvalan Industries, Inc.*, 422 F. Supp. 346, 349 (S.D.N.Y. 1976); *see Stanton* v. *Miller*, 58 N.Y. 192, 201 (1874); *Van Tassel* v. *Burger*, 119 App. Div. 509, 511, 104 N.Y.S. 273, 274 (1907); *Alexander* v. *Quality Leather Goods Corp.*, 150 Misc. 577, 579-80, 269 N.Y.S. 499, 502 (Sup. Ct. 1934); 28 Am. Jur.2d Escrow § 10 (1966). Only on the performance of certain conditions—here, the approval of claims—does title to property in escrow change hands. If the conditions are not performed within the time agreed on, the escrow terminates and the property is returned to its owner. 28 Am. Jur.2d Escrow at §§ 10, 17.

will be affected is that in which plaintiffs are not expected to claim any injury. Only a punitive rationale can support such an action, and this rationale is not an appropriate one to support a class action under Rule 23 unless an underlying substantive statute allows it.* It is surely not too much as a policy matter to require plaintiffs to allege and demonstrate that they have been injured before an attorney receives payment for having vindicated their right. The only kind of actions that may be restricted by application of the American Rule on attorneys' fees to class actions will be those in which the attorneys are the principal, if not the only, beneficiaries of the class action judgment.

Further, if attorneys' fees are awarded in this case from the amount actually claimed by debentureholders, maximum incentive will be given to the class attorneys to find their clients, the debentureholders who failed to convert and for whose benefit this action was brought. If class attorneys may rely on being compensated on the basis of a theoretical maximum without regard to actual benefits conferred, they will have little incentive to expend much effort in locating class members. The most vigorous representation of the interests of the entire class could cease just at the time when such representation becomes most important.

It is submitted that the Court of Appeals' *en banc* majority decision in this case will insure the proliferation of class action litigation by compensating attorneys far beyond any benefits in fact conferred by their efforts. The decision will

* Even if a punitive rationale were acceptable for some class actions, for example those in which large numbers of consumer plaintiffs had been cheated by a small amount, such a rationale would not be proper in this case. Boeing was forced to make a choice between the interests of its debt and equity holders which it believed, based on opinions of counsel, accorded with current law, and which it was subsequently told was wrong in an opinion whose soundness has been questioned. *See* Case Note [on *Van Gemert I*], 89 Harv. L. Rev. 1016 (1976).

also insure protraction in these actions by class attorneys even when the class they represent has lost interest in the case. The judgment of the Court of Appeals therefore should be reversed.

CONCLUSION

Both because of the important effect of this decision on class action litigation, and because the decision is contrary to the American Rule on attorneys' fees as set forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), petitioners respectfully submit that the judgment of the Court of Appeals (*en banc*) should be reversed.

Dated: New York, New York
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IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1327

THE BOEING COMPANY (formerly THE BOEING AIRPLANE COMPANY), *et al.*,

Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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Statute Involved.

Judiciary Law of the State of New York:

§475. Attorney's lien in action, special or other proceeding.

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds

thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. L. 1909, c. 35; amended L. 1936, c. 876; L. 1938, c. 34; L. 1946, c. 105, eff. Sept. 1, 1946.

Question Presented.

In a class action certified under Rule 23(b) (1) in which the relief sought was the preservation of a fund consisting of shares of stock and the relief granted was the dollar value of that stock, are the fees of the attorneys representing the class and plaintiffs' litigation expenses to be awarded "off the top" of the fund or are they to come from a limited part of the fund only?

Statement of the Case.

A

The issue in this case is whether attorneys who bring a fund into court for the benefit of a class are to be paid by and from the entire fund or from a part of it.

Since 1881 when *Trustees* v. *Greenough,* 105 U.S. 525 (1881) was decided, the rule has been that fees and expenses of counsel were paid out of the fund "off the top" (Cf. 16a). After payment of the fees and expenses the class received the net proceeds. To the best of our knowledge, there has been no deviation from this rule whenever a common fund has been put in the control of the court.

Defendant contends that all unclaimed funds may revert to it and, therefore, if the whole fund is diminished by the payment of fees, the sum which may be returned to it would be decreased. This, it says, would violate

the American Rule in that it would be paying a part of the plaintiffs' fees. We respectfully submit, even on the very questionable assumption that the money may revert to defendant that a) such diminution would not be a payment by defendant in its capacity as defendant and b) that so long as defendant pays no more than the damages which it owes to plaintiffs, there is no infringement on the American Rule.

Defendant, in a second and partly conflicting argument, elects itself as the representative of the absent members of the class. As such, it contends that non-claimants have received no benefit and, therefore, that under *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), they should contribute no fee. We answer a) that *Alyeska* is not involved because this is a common fund and not a common benefit case and b) that if *Alyeska* were involved, the right of the absentees to claim their shares is an evident benefit (see footnotes, 11a-13a).

The Court of Appeals took *Alyeska* as its point of departure (7a). It held that this case is governed by *Greenough* (8a-10a) and "time-honored principles of the common law" (13a). It held further that this case meets the requirements for the payment of the fees of plaintiffs' attorneys by the losing defendant in class actions (9a-11a). Thus, on both grounds it decided for plaintiffs. We respectfully submit that the rulings predicated on *Alyeska* are correct but unnecessary to the case.

B

We shall restate the facts only to the extent necessary to distinguish between what is involved in this case and what is not.

On March 29, 1966, the members of the plaintiff class owned debentures of a face value of $1,544,300 which they might have converted on that day into shares of

stock with a market value of $3,289,359. Each $100 debenture was worth $316.25. But the members of the class had not seen or heard of either of two small advertisements which Boeing had inserted in *The Wall Street Journal* and which purported to terminate the conversion rights on March 29. On March 30, 1966 and thereafter, Boeing asserted that each $100 debenture was redeemable at $103.25 and that all rights to convert had expired. Thereafter, it refused all tenders for conversion and it refused to compensate plaintiffs for their loss.

The original fund in this case consisted of shares of Boeing common stock. They were set aside and reserved by Boeing as required by the indenture to be issued in return for debentures which might be tendered for conversion (Indenture, p. 39). The judgment created a fund in dollars in substitution for the shares (8a-9a). The judgment decreed that the plaintiff class "shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest thereon at the legal rates" (40a). It further decreed that each member of the class who had not previously redeemed his debenture "shall be entitled to receive the sum of $316.25 for each $100 face amount of debenture" and that each member who had redeemed "shall be entitled to receive the sum of $213 for each $100 face amount of debenture"; in each case with interest (40a-41a). The individual payments were, of course, to come out of the fund.

C

Boeing says that the class members are not identifiable unless they file proofs of claim. The Court of Appeals held that the identification was sufficient under the decisions of this Court (9a-10a). It so held even though it was unaware that as of June 25, 1979, Boeing had identified the holders of the debentures or their authorized agents well enough to pay off the face amount (in redemption) of 83.3% of the debentures and the Special

Master had identified and paid off 13.1% more, for a total identification of the holders of 96.4% of the debentures held by the class. (We are informed that the Special Master will offer this proof to the Court.)

Boeing, less ardently than the dissenting opinion in the Court of Appeals, alludes to class actions as sometimes being "lawyers' suits." That is not this case. Plaintiffs, most of them as stockholders exercising rights in 1958, invested substantial sums of their money in an American corporate enterprise which they felt would grow and they have been shabbily treated. For example, two clients of the undersigned (as distinguished from class members who came to know us after our appointment as co-counsel) exercised their rights, in 1958, to purchase $20,000 and $3,000 respectively of the bonds, as an investment which, they hoped, would grow in value; they held the debentures until 1966 and the inability to convert cost them respectively $42,600 and $9,400 (before interest). They needed no stimulation from lawyers to bring action.

Boeing cites cases requiring each plaintiff in a class to prove his damages. We do not question that before receiving payment, the holder must surrender the debenture or provide proof of loss. But unquestionably there is in this case an owner of each debenture who suffered specific damage, whether he holds some of the unredeemed 3.6% or held some of the redeemed 96.4%. There is no question about the fact that every person who bought the Boeing bonds and did not convert them before March 29 lost a very specific and substantial sum of money, the amount of which is established by elementary arithmetic (5a).

The judgment is for the arithmetically computed exact damages suffered by the class and for no more. There has been no fee charged against Boeing, no "taxation of costs [fees] between party and party." The only issue

is how the "costs [fees] between solicitor and client" are to be borne. Shall the fund pay the fees and expenses of the litigation or shall the costs of the litigation for the whole class be borne by those who are here, after thirteen and a half years, to file their claims? At this time filed claims aggregate approximately 50%. (Again, the Special Master will offer a report.) As matters stand, must claimants pay twice the amount of their proper fees? Are their arithmetically proved damages to be reduced doubly because the others are not here? Boeing says "yes" and we submit that such an inequitable result cannot be right.

It should be noted that the question does not arise on an application for counsel fees made by plaintiffs or by the attorneys. It arises on an appeal from the judgment which directs that payment of the fees and expenses shall be made out of the fund.

Summary of Argument.

1. In the nearly one hundred years since *Trustees* v. *Greenough,* 105 U.S. 527 (1881), it has been uniformly held that a party (or his attorney) who brings a fund into court for the benefit of a class is entitled to receive his legal fees and disbursements out of the fund before the net proceeds are distributed to the class. The reason is that if a fund has been preserved or created for the class by the action of some members of the class, equity requires that the costs of the action be distributed ratably among those who are entitled, by the judgment, to recover their damages.

2. Beginning in 1966, in a case certified under Rule 23 (b) (1) as a class action, each and every member of the class is bound by the judgment in the action "whether favorable or unfavorable." Rule 23(c). The direction for the payment of the fee from the common fund is a binding part of the judgment obtained by the attorneys for the class.

3. The American Rule is not involved. Defendant is called upon to pay only the amount of plaintiffs' arithmetically established damages with no excess to cover plaintiffs' fees. *Greenough* established that payment out of the fund is consistent with the American Rule. On the unlikely hypothesis that the net proceeds of unclaimed shares may revert to Boeing, the difference between the net fund and the gross fund does not constitute a payment by Boeing; nor is the deduction a contribution by it in its capacity as defendant. There is no possible justification for Boeing receiving more money than the absentee would have received if he had become aware of his rights.

4. In our opinion, *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975) has made no change in the law of the "common fund." *Alyeska* was a class action without a fund. However, the requirements indicated there for non-fund cases are fully met in this case.

5. An unfair charge against plaintiffs' recovery would damage American investors, not class action attorneys; fairness to the investor demands that he pay one fee, not two.

POINT I.

The present issue was decided in *Trustees v. Greenough*, which has been followed uniformly for just under a century.

In *Greenough,* a member of a class of bondholders retrieved for the class a fund of money and property which had been improperly transferred by the trustees under the indenture. This Court held that the plaintiff was entitled to repayment of his fees and expense in the litigation. The Court held that such payment did not conflict with the American Rule but followed the established equity practice of the English courts. The Court cited

the cases in which a creditor had protected a fund for all of the debtor's creditors by initating a creditors' bill or a bankruptcy proceeding; and in which a fund established for charitable uses was protected by plaintiffs' intervention (pp. 533-4). Accordingly, it did equity by spreading the cost of the litigation among the whole class.

Professor Dawson comments:

> "The 'common fund' as originally conceived and applied by the United States Supreme Court in *Trustees* v. *Greenough* provided a just and reasonable solution. * * * Contribution in this form awarded to the litigant was entirely consistent with the broader purpose of preventing enrichment through another's loss. * * * Contribution exacted from the assets that his efforts had preserved merely distributed the loss." Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 Harv. L. Rev. 849, 849-51 (1975).

Greenough has been followed in the federal courts without exception ever since. Among the more recent cases are *Swanson* v. *American Consumer Industries,* 517 F. 2d 555 (7th Cir. 1975), in which the fund was created by a judgment and *City of Detroit* v. *Grinnell,* 495 F. 2d 448 (2nd Cir. 1974), in which the fund was created by a settlement.

The prayer for relief in this consolidated action, asked that Boeing be directed "to deliver to plaintiffs as their interests may appear in return for their debentures the securities herein described." That fund of shares had been set aside and reserved in accordance with Section 4.07 of the Indenture which was entitled *"Company to Reserve Stock."* (Also included were stock dividends which had been declared in the interim.) Plaintiffs preserved that fund and created in substitution for it a dollar fund measured precisely at the value of the shares in the fund. It is to that fund that the *"Greenough-Pettus* machinery" (Prof. Dawson's phrase) has been applied.

After *Greenough* came *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885). It followed *Greenough* and added two elements. For one, it permitted the attorney for the actor-class-member to apply directly for his fee. More important here, is that it recognized the priority of the Alabama common-law attorney's lien on the fund which the attorneys had brought into court. Thus, the equitable charge became a lien at law.

Rule 23 (to be discussed in Point II below) only reinforces the applicability of what Professor Dawson calls "the *Greenough-Pettus* machinery."

* * *

Boeing's comments on *Pettus* (its brief, p. 14) are incredible. Boeing says that this Court "did not grant attorneys' fees from the entire pool of assets recovered." We have reread and restudied the opinion of this Court and the opinion of the District Court in 3 Wood's Reports 620, and find absolutely no evidence that one iota of the property recovered was excluded from the lien granted to the attorneys. In 113 U.S. at p. 117 there is a list of the property of the railroad which certainly seems complete. At p. 119 the Court describes the decree below as directing "that the property of all kinds, belonging to the latter company * * * be sold to satisfy its debts according to priority." At p. 121 the Court says: "The prayer of the petition was * * * that they be declared to have a lien for the value of their services on all the property of that company." At p. 127 the Court said that the attorneys were "entitled to reasonable compensation" for establishing a lien "upon the property described in the suit" and that the Court below did not err "in declaring a lien upon the property in question." At no point is any part of the property distinguished from the whole by exclusion or otherwise.

Boeing proceeds to say that this phantom exclusion of property was "because under the common fund doctrine fees could only be collected from creditors 'who participated in the benefit' of the action, 113 U.S. at p. 125." The Court said no such thing; the full phrase was "participated in the benefit of their labors" and was a part of a restatement by the Court of the testimony given by one of the lawyers as to what he had said to the client. Nowhere did the Court adopt that or similar language as its own.

Boeing then says that "This Court thus held that plaintiff's attorneys' fees could only be taken from the amount of claims actually 'filed in the cause.' 113 U.S. at 127." The Court said no such thing. It said that the "calculation" of "the compensation" of the attorneys should be "made with reference to the amount of all claims filed." The purpose of that phrase was to include in calculating the fee all claims which had been filed even though they had been purchased by defendants from the original creditors and to exclude claims which had been purchased by defendants from other creditors and had not been filed.

POINT II.

Under Rule 23 the attorneys represent the whole class, the judgment is binding on the whole class and each member of the class has an interest in the fund.

On Boeing's motion this case was certified as a class action under Rule 23(b)(1). Under Rule 23(c) every member of the class, present or absent, is bound by the judgment "whether favorable or unfavorable." 3B. Moore's Federal Practice 23-466 (1978). Dawson, *supra,* 88 Harv. L. Rev. 849, 918 (1975). Gordon, *Manageability Under the Proposed Uniform Class Actions Act,* 31 S.W.L.J. 715, 717 (1977).

The District Court selected three attorneys to represent the class from among the many who had instituted actions. This effectively created an attorney-client relationship between the three and the members of the class.

The Court of Appeals wrote:

> "A certification under Rule 23(c) makes the *class* the attorneys' client for all practical purposes. *Developments in the Law: Class Actions* 89 Harv. L. Rev. 1318."

Chief Judge Mishler (Eastern District, New York) put it:

> "The point is that by granting class status, the court places the attorney for the named parties in a position of public trust and responsibility, and in effect creates an attorney-client relationship between the absentee members and the attorney." (*Cullen* v. *New York Civil Service Commission,* 435 F. Supp. 546, 560 [E.D.N.Y. 1977], app. dism. 566 F. 2d 846 [2d Cir., 1977].)

Under Rule 23(b) (1) no class member may opt out and although under Rule 23(d) (4) a motion may lie to eliminate the attorneys' "representation of absent persons" no such motion was made and no justification for such a motion is evident.

In *Pettus* the court attached the common-law attorney's lien to the entire fund even though the attorneys represented only a few of the bondholders and although only those who joined in the suit were bound by the result. Now that Rule 23 binds all members of the class and the attorney-client relation is established for the entire class, the applicability of the *"Greenough-Pettus machinery"* would seem to be beyond question.

The common-law lien recognized in *Pettus* is now statutory in New York. Section 475 of the Judiciary Law in

New York recognizes a lien on the cause of action and the judgment. The legal lien is a close kin to the equitable charge. Dawson, *"Lawyers and Involuntary Clients in Public Interest Litigation,"* 88 Harv. L. Rev. 849, 884 (1975).

POINT III.

Neither the American Rule nor common sense justifies non-contribution from absentee shares.

Greenough upholds "the power of a court of equity in cases of administration under its control, to make such allowance to the parties out of the fund as justice and equity may require" (105 U.S. at p. 535).

Attorneys for the whole class have procured a judgment for the whole class. Each member may collect his part of the judgment "on request" (12a). Is there any reason for the fee and the expense not to be spread equally; or do "justice and equity * * * require" that some pay more than their ratable share?

The argument is made that the absentee got no benefit. His right to come in and "on request" to be handed money—the maximum amount of money permissible under the American Rule—is said to be no benefit.

Boeing's theory is that, on the one hand, claiming plaintiffs should pay a bigger share of the fee if others do not appear, and that, on the other hand, the ultimate recipient of the absentee's share should receive more than the absentee would have received had the absentee collected the binding judgment obtained by his attorney. This seems neither "the justice" nor "the equity" prescribed by *Greenough*.

And if the "broader purpose of preventing enrichment through another's loss" (Dawson, *supra*, 88 Harv. L. Rev.

at p. 850) is the objective, it can surely not be served by increasing the loss of the claimants and enriching Boeing or New York State.

In essence, Boeing is advocating a "fluid charge." Certain plaintiffs' attorneys sought unsuccessfully to increase the recovery by obtaining the unclaimed funds for claiming plaintiffs—a "fluid recovery" (5a). Now Boeing seeks to decrease the recovery by charging the fees of the non-claimants against the claiming plaintiffs—a "fluid charge," varying with the number of non-claimants. One is as pernicious as the other.

POINT IV.

Alyeska is not relevant but its requirements are met in this case.

In *Alyeska*, this Court drew a line between the "common fund" cases and the "common benefit" cases (421 U.S. at p. 258). The opinion shows no intention to change the law in common fund cases. After describing *Greenough* (421 U.S. at p. 257), the Court, through Mr. Justice White, rejected any suggestion that the common fund and common benefit doctrines are the same (*id.*, at p. 258, footnote 30).

The common benefit cases have evolved as a new doctrine. In cases where plaintiffs have not preserved or produced a fund from which counsel may be paid, the issue is whether and under which circumstances the plaintiffs' fee is to be paid by a losing defendant.

Sprague v. *Ticonic National Bank*, 307 U.S. 161 (1939) was, in fact, a common fund case, as Professor Dawson points out. There was one fund there with fourteen different beneficiaries, so that payment out of the fund was perfectly consistent with *Greenough* and the American Rule. Dawson, *supra*, 88 Harv. L. Rev. 917, footnote 285.

But in cases of common benefit, where there is no fund, such as *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Hall* v. *Cole,* 412 U.S. 1 (1973), this Court has permitted costs to be taxed against both the winners and the losers when a benefit was conferred on a corporation in which all were stockholders or on all members of a union, the treasury of which belonged to winners and losers. Since all were benefited "justice and equity" were served if the non-plaintiffs shared the cost with the plaintiffs. The corporate capitalization and the union treasury were quite close to being funds.

To the extent that "common benefit" enters into this case all members of the class received the "common benefit" in the right of all to obtain their damages "on request."

If, in fact, this Court did, in *Alyeska,* intend to modify the "common fund" doctrine by adding conditions to recovery of the costs, we can add only here and there to what Chief Judge Kaufman has written. As stated above, on the matter of identification, Judge Kaufman could not have known that by June 25, 1979, Boeing and the Special Master had identified and paid off the holders of 96.4% of the debentures. If Boeing has not kept adequate follow-up information as to those class members, that should not be to the disadvantage of the class who did not have that information.

If the requirement is to prove the exact damage, or the prorating of the net fund among the debentures, that is simple (10a-11a).

If the requirement is to show a "benefit," the right to come in at any time within twenty years to claim damages is surely such (12a).

POINT V.

The American Rule is not offended.

The American Rule does not forbid a judgment which is in the exact amount of plaintiffs' damages and which leaves to plaintiffs the payment of the fees and expense of the litigation. "There is no 'surcharge' on the defeated litigant" when the deduction is "from the amount for which Boeing has *already* been held liable" (17a).

Boeing is paying nothing in its capacity as defendant; the fee comes not from it but from the absentee plaintiff. Similar situations have been presented in derivative actions. A minority stockholder recovers for the corporation a judgment against majority stockholders. From the recovery, the corporation pays a fee, thereby paying out money belonging partly to the majority stockholders and partly to the minority. But that cost is not a charge to the majority in their position as defendants; it is a cost to the corporation for increasing the equity of both majority and minority.

Hechelman v. Geyer, 252 Pa. 123, 97 A. 193 (1917);

Sant v. *Penonville Shingle Co.,* 179 Mich. 42, 146 N.W. 212 (1914).

So here, if a fee had been taken from a share paid to Boeing or to New York State, the deduction would affect the recipient as one which had fallen heir to an absentee's share, and not because it was a defendant in the case.

POINT VI.

The error in the dissenting opinion below arose because the focus was on the class action attorney rather than the American investor.

The ten-page dissenting opinion in the Court of Appeals is vehement, to say the least, in its attack on "class action lawyers". It is also vigorous in protecting plaintiffs who have not heard of the judgment from having their unclaimed shares contribute to the fees.

We find only one reference (in those ten pages) to those plaintiffs whose interests should be the heart of the case. At page 21a the dissenters say that "the lawyers advocate only their own cause and, as an incident thereto, the cause of their clients". Otherwise, plaintiffs are non-persons in the opinion.

The undersigned and his firm are not "class action lawyers". Nor do we espouse the cause of "class action lawyers". We are here because we have clients who invested their money in an American business enterprise with the hope that their investment would grow in value. It did and then Boeing attempted to deprive them of their fortunate investment.

Plaintiffs supplied Boeing with capital which it needed. The same people usually invest in other companies too. Boeing had every opportunity to give personal notice of the call to the holders (64a). Boeing, having found that the anti-dilution clause of the indenture entitled the holders to more than two shares for each $100, recomputed the conversion rate, so that by a hair's breadth it held the rate to two (78a-82a). The Court of Appeals found that the original computation was in accord with "general accounting practice" and "the economic realities" but could not find "clearly erroneous" the lower court finding that Boeing's revision of the figures was in "good faith" (81a-82a).

Boeing's purpose in all of its actions was to prevent the dilution of its share price and to prevent the loss of pennies a share in Boeing's reported earnings. There is nothing illegitimate about that when done fairly but when the holders are mistreated the whole fabric of our system is damaged.

We respectfully submit that the issue of whether plaintiffs should pay double fees to recover only what was due them does raise a policy question. But the real issue in this case is not what the attitude should be as to class action lawyers but the extent to which the courts must supply the justice which the American corporation sometimes denies its investors.

Alyeska made clear that there is a line to be drawn between "public interest" cases and "common fund" cases and even "common interest" cases such as *Mills* and *Hall*. There is no need to apply *Greenough* to every class action. The courts have had no hesitancy in applying justice according to the cases (as in "fluid recovery"). *City of Detroit* v. *Grinnell Corp.*, 495 F. 2d 448 (2d Cir. 1974) and *Lindy Brothers* v. *American Radiator etc.*, 487 F. 2d 161 (3rd Cir. 1973) make it clear that the interest of plaintiffs will be protected. In this case those interests far transcend those of the attorneys. The result of this appeal cannot increase plaintiffs' attorneys' fees (except for the services rendered on the appeal). If there were a reversal, it could affect only one of many factors determining the *quantum* of the fee. Such a result would almost certainly hurt plaintiffs substantially more than it would the attorneys.

Greenough provided the solution which was just and fair. We respectfully submit that it should be followed under Rule 23.

Conclusion.

The judgment below is just and equitable and follows the *Greenough-Pettus* doctrine which distributes the cost of preserving or producing a fund for a class.

While the facts here are well within the limitations of the common benefit cases, it is unnecessary to consider that doctrine in deciding this case.

We respectfully submit that the judgment should be affirmed.

Dated New York, New York,
July 27, 1979.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1327

THE BOEING COMPANY

(formerly The Boeing Airplane Company), *et al.*,

Petitioners,

—v.—

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

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THE BOEING COMPANY

(formerly The Boeing Airplane Company), *et al.*,

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WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Question Presented

In a successfully prosecuted class action, resulting in judgment for the class in the full amount of damages plus pre-judgment interest, should plaintiffs' counsel fees be assessed only against the claiming class members or against both the claimed and unclaimed portions of the judgment fund deposited in court especially where the defendants have no right to any of the unclaimed portion of the fund deposited and defendants' bad faith rendered difficult, and in some cases impossible, the locating of certain potential claimants?

Statement of Facts

This action was commenced thirteen years ago to recover damages on behalf of certain holders of 4½% Convertible Subordinated Debentures, due July 1, 1980 (the "Debentures") issued in bearer form by The Boeing Company ("Boeing"). Boeing called the Debentures for redemption in February 1966, but holders of $1,544,300 of unregistered Debentures did not learn of the call until after the conversion deadline, midnight, March 29, 1966. After that deadline, Debenture holders lost their right to convert $100 in principal of Debentures into two shares of common stock. The two shares were worth $316.25 on that day, but the uninformed Debenture holders only had the right to redeem their Debentures at $103.25.

William Van Gemert and several other non-converting Debenture holders brought this action against Boeing, in 1966, alleging inadequate and unreasonable notice of Boeing's call. This action was certified as a class action under Fed. R. Civ. P. 23(b) (1) and (2), upon motion of Boeing, by order of the District Court dated October 4, 1966. The class certified is:

> . . . plaintiffs and all other present and former holders of The Boeing Company (formerly Boeing Airplane Company) 4½% convertible subordinated debentures due July 1, 1980 and called for redemption on April 8, 1966 whose debentures were not surrendered for conversion on or before March 29, 1966. . . . Order of Hon. Sylvester J. Ryan entered October 4, 1966, at p. 8.

Plaintiffs' counsel successfully prosecuted this lawsuit and obtained a judgment, which has been deposited with the District Court and which, with interest, now exceeds

$7 million. This amount, which includes pre-judgment interest, is more than twice the initial amount of damages of the non-converting Debenture holders. Accordingly, plaintiffs' counsel have preserved, in full measure, the rights of the members of the class in an action which was not settled, but was fought, against able counsel, to the bitter end.

The tenacity with which this lawsuit was prosecuted and defended is demonstrated by a summary of its procedural history. After a full trial, the District Court dismissed the complaint. A panel of the Court of Appeals for the Second Circuit reversed, held Boeing liable for its failure to give adequate notice of the redemption, and remanded to the District Court for a determination of damages. *Van Gemert* v. *Boeing Co.*, 520 F.2d 1373 (2d Cir.), *cert. denied*, 423 U.S. 947 (1975) (*Van Gemert I*) (A53a).* The *Van Gemert I* Court held that ". . . there was an obligation on Boeing's part to give reasonably adequate notice of the redemption to the debenture holders, which obligation was not fulfilled in this instance." *Id.* at 1375 (A55a). Moreover, while the notice ". . . may have conformed to the requirements of the Indenture it was simply insufficient to give fair and reasonable notice to the debenture holders. *Id.* at 1383 (A73a).

On remand, the District Court calculated damages and a judgment was thereafter entered against Boeing for damages in the sum of $3,289,359. on December 28, 1976. The judgment did not award the plaintiff class pre-judgment interest and plaintiffs appealed therefrom.** In *Van Gemert* v. *Boeing Co.*, 553 F.2d 812 (2d Cir. 1977) (*Van*

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* Citations to the Appendix filed by Boeing shall be "A....a".

** No appeal was ever taken by Boeing from the entry of the judgment against it awarding the $3,289,359. to plaintiffs as damages.

Gemert II) (A45a), the Court of Appeals reversed and awarded plaintiffs pre-judgment interest, thereby increasing the amount of damages from $3,289,359. to $5,749,990.83. The Court based its award of pre-judgment interest on Boeing's breach of its contract with the plaintiffs, stating ". . . every contract contains the implied requirement of good faith and fair dealing. Boeing was found liable therefore because it breached its contract with appellants, and damages were awarded." *Id.* at 815 (A50a).

On the remand of *Van Gemert II,* the District Court entered judgment for "all members of the plaintiff class", and adjudged that plaintiffs recover the above damages together with pre-judgment interest thereon. The judgment was docketed on July 6, 1977, and no appeal was ever taken by Boeing from this judgment of interest added to the prior damage judgment. Boeing did appeal from a portion of this judgment which dealt, not with the monetary judgment against Boeing, but with a separate issue of the award of counsel fees—the District Court had further ordered that plaintiffs' attorneys be awarded fees, expenses, and disbursements from the total amount of the judgment (A39a). On appeal solely from this issue of the award of the attorneys' fees, the Court of Appeals reversed holding plaintiffs' attorneys' fees should only be charged against the amount claimed. *Van Gemert* v. *Boeing Co.,* 573 F.2d 733, 736 (2d Cir. 1978) (*Van Gemert III*) (A27a). Plaintiffs then moved for, and were granted, reargument *en banc.* The Court of Appeals *en banc,* affirmed the District Court on the source of attorneys' fees, expenses, and disbursements. *Van Gemert* v. *Boeing Co.,* 590 F.2d 433 (2d Cir. 1978) (A1a). To review the *en banc* decision, this Court granted *certiorari.*

The issue here is *not* the amount of fees of plaintiffs' counsel, only their source. After a decision here, the District Court, which has not yet even determined the compensation of plaintiffs' counsel, will compute the amount in accordance with the current criteria for such calculation. This Court will not confer any so-called "windfall" benefit on plaintiffs' counsel by affirming the decision below.

Although the decision below states that only 20% of the judgment has been claimed (A16a), the *amicus* brief filed here by the Special Master indicates in excess of 45% of the judgment is now claimed. The low response in proofs of claims filed cannot be attributed to any inadequacy in the efforts by plaintiffs' counsel or the relief granted by the judgment. The Special Master has attributed the low response to "both the passage of 12 years and the fact that the debentures were unregistered" (A16a).* Efforts by the Special Master to locate class members are continuing.

There is a further, perhaps the principal, reason for the slow response. Boeing maintained throughout the litigation that those class members who redeemed their debentures during the litigation, *85% of all class members,* waived any right to damages and, in fact, notified such redeeming class members of its position.** Years later the

* Both reasons are the result of the defendants' actions. In *Van Gemert I,* the court held defendants liable as the Debentures themselves did not adequately apprise the class members of the notice to be given of the expiration of conversion rights. *Van Gemert I, supra,* 520 F.2d at 1383. The court further ruled the Debentures were insufficient in failing to give notice to the class members that they could receive "mail notice by registering their debentures." *Id.* The absence of registration, and the resulting inability of the Special Master to yet locate all class members, is attributable to the very same acts by defendants which resulted in the judgment against them.

** Very early in the litigation plaintiffs' counsel attempted to enjoin Boeing from notifying redeeming bondholders that any redemption would be a waiver of damages. Judge Ryan, at that early stage of the litigation, refused to enjoin Boeing from so notifying

District Court ruled that there was no waiver. Yet Boeing failed to notify the late redeemers of that decision. As a result, many redeeming bondholders may not have claimed their portion of the judgment in the mistaken belief that they had waived their right to a recovery. Moreover, the vast majority of Debentures redeemed during this litigation were redeemed through banks and brokerage houses which retained the names of their clients without forwarding them to Boeing. Boeing failed—whether purposely or not is unknown—to advise those institutions of the pendency of this litigation and the critical necessity of retaining the names of those for whom they were redeeming. As a result of Boeing's failure to insure retention of those names, the lists were, with the passage of time, routinely destroyed by the banks and brokerage firms, thereby rendering difficult, if not impossible, the Special Master's locating these missing class members at this late date.

Boeing's further contention—that there will be no incentive for plaintiffs' counsel to find these absent class members if fees are awarded out of the unclaimed portion of the judgment fund—simply has no application here. The District Court appointed a Special Master (A41a-42a) to locate claimants and placed that responsibility primarily on his shoulders, not counsel's. Plaintiffs' counsel have cooperated in the efforts to locate class members and will continue to do so.

The issue here is the source of the fees, not their amount. In reviewing the relevant case law on that narrow issue, the unique nature of this case is important. Its termination is very different from the great majority of class

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bondholders even though he indicated that he did not believe that the redemption would cause a waiver of rights in the litigation. *See* Transcript of hearing before Hon. Sylvester J. Ryan, September 19, 1966. Notwithstanding Judge Ryan's statement, Boeing did notify the redeeming bondholders of its waiver position.

actions in that, after trial, judgment was here entered for the *full amount claimed, plus pre-judgment interest.* As Circuit Judge Oakes wrote, dissenting in part from *Van Gemert III, supra,* 573 F.2d at 737:

> A decade of hard-fought difficult litigation has at last resulted in an award to the debenture holders which, had the original notice been sufficient would have rightfully been theirs for the asking. In the process, against uphill odds, the lawyers for the now successful plaintiffs did an extraordinarily capable job, having even "made new law" on a complicated set of facts. Thus, criticism against class actions generally or plaintiffs' attorneys' fees in particular falls flat when focused on the case at bar. (A35a) (Footnote omitted).

Summary of Argument

The decision below correctly analyzes both the recent and early decisions of this Court uniformly supporting the award of plaintiffs' legal fees from the full amount of the fund deposited by Boeing. As consistently recognized by this Court beginning with *Trustees* v. *Greenough,* 105 U.S. 527 (1881), through *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), and finally *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), equity and precedent direct the payment of fees to plaintiffs' counsel from a common fund they created for the benefit of a class.

In *Alyeska* this Court approved the almost century-old line of precedents beginning with *Greenough* which, upon the creation of a common fund, award fees, not from the amount claimed, but from the entire fund created. This Court reaffirmed those holdings by stating that "a party preserving or recovering a fund for the benefit of others in addition to himself" may "recover his costs, including

his attorneys' fees, from the fund or property itself . . ." *Alyeska,* 421 U.S. at 257.

In the seminal decision of *Trustees* v. *Greenough, supra,* this Court stressed that it was the creation of a fund, not the vagaries of the amount of claims, which entitled plaintiff to reimbursement from the fund. Assessing the entire fund would distribute the cost ratably among all entitled to claim. The number of claims is immaterial since it is the creation of the fund which confers the benefit.

Trustees v. *Greenough* was re-emphasized in *Sprague, supra.* That subsequent action was not brought for a class, but the decision had a *stare decisis* effect on other claimants to a fund. Even though the other potential claimants were not before the court, and may never have subsequently brought their own suits to claim their portions of the fund, the plaintiff in *Sprague* was permitted to look to the entire fund as a source for reimbursement of counsel fees.

This Court's decision in *Alyeska, supra,* in no way overruled or modified the decisions in the common fund cases. Instead, *Alyeska* is a brake on the recently decided cases which shift plaintiffs' legal fees to defendants as a consequence of the successful prosecution of class actions where no common fund is created, but where the benefit created is non-monetary. These fee shifting cases are epitomized by the decisions of this Court in *Hall* v. *Cole,* 412 U.S. 1 (1973) and *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970).

Hall and *Mills* differ from the instant case since those actions did not involve payment of fees from a common fund, but instead involved a shifting of plaintiff's counsel fees to a defendant where a non-monetary benefit was conferred upon the defendant as well as the plaintiff and

others similarly situated. As in *Hall* and *Mills,* plaintiff's counsel in *Alyeska* sought to have its fee shifted to the defendant. However, since the defendant in *Alyeska* was not a beneficiary of the action as was the case in *Hall* and *Mills,* this Court did not shift the fee.

The instant case, on the contrary, deals with a common fund. Payment from that fund will insure that all class members will bear their pro rata share of the expenses and that the claiming class members do not subsidize the non-claiming.

Boeing has been adjudged liable and has paid the amount of the judgment into an account controlled by the Court. Accordingly, it has no further interest in the common fund, and fees are not being shifted to it. As a result, Boeing lacks standing to prosecute this appeal.

The entire fund will eventually be claimed, as that portion of the fund not paid to class members will escheat to the State of New York. N.Y. Aband. Prop. Law (McKinney 1978) § 1200. New York's interest derives from the rights of non-claiming class members and therefore is subject to the payment of fees to plaintiffs' counsel just as are the interests of the claiming class members.

The judgment entered for damages by the class is a final judgment which Boeing has not appealed. Each class member, both claiming and non-claiming, has a vested property right in that judgment which is clearly a benefit.

To a limited extent this case may involve a shifting of a portion of the fee. Boeing failed to take steps within its power to preserve the names and locations of the 85% of the class members who redeemed during the course of this litigation. Such conduct amounts to bad faith, thereby permitting an assessment of fees against Boeing even if

it has a legal interest in the unclaimed portion of the fund. *Alyeska, supra,* 421 U.S. at 245.

Arguments that an affirmance of the decision below will act as a dis-incentive to the efforts of plaintiffs' counsel to locate missing class members are wholly misplaced. Here, plaintiffs' counsel have fully cooperated in the attempts to locate missing class members. For Boeing to suggest, after fighting since 1966 to prevent any payment at all to the Debenture holders, that plaintiffs' counsel have shirked their responsibilities is the height of hypocrisy. Boeing's contentions that an affirmance will encourage baseless class actions is meritless, as the issue here is not the size of counsel fees, but their source. Based on current judicial criteria, the District Court is required to, and will, determine the amount of counsel fees. Finally, a reversal of the decision below will inject new uncertainties into the prosecution and defense of class actions and will lead to unnecessary delays in their termination.

ARGUMENT

I

Payment of Plaintiffs' Attorneys' Fees and Costs From the Full Amount Deposited Is Consistent With the American Rule Because the Deposit Created a Common Fund for All Class Members.

A. *Fees of Plaintiffs' Attorneys Should Be Charged to the Entire Fund They Have Created.*

Where a common fund has been established,* whether or not as a result of a class action,** the attorneys' fees are charged to the entire fund, regardless of the amount of claims. *Sprague* v. *Ticonic National Bank, supra; Trustees* v. *Greenough, supra.* The decision below properly analyzed these cases in viewing the amount deposited by Boeing as a common fund, available for compensation of plaintiffs' counsel.

In *Greenough,* the plaintiff was held entitled to recover his counsel fees from the entire fund created. The action, on behalf of plaintiff and similarly situated bondholders, succeeded in establishing a fund for the payment of principal and interest due on the bonds. Attorneys' fees and other expenses were sought from the fund created. Although most of the bondholders had filed claims, the decision specifically discloses that some had not. This Court said:

> . . . [A] considerable amount of money was realized, and dividends have been made amongst the bondhold-

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* [I]t is now settled that a *money judgment* or even a settlement can serve as a [common] fund." *Vincent* v. *Hughes Air West, Inc.,* 557 F.2d 759, 770 (9th Cir. 1977).

** The class action is the classic example of the common fund which creates benefits for others. *City of Klawock* v. *Gustafson,* 585 F.2d 428, 431 (9th Cir. 1978).

> ers, *most of whom came in and took the benefit of the litigation. Id.* 105 U.S. at 529. (Emphasis added).

Bondholders not claiming were, nevertheless, to have the right to make a later claim.

> The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. *Id.* at 531.

In *Greenough,* where some bondholders had not claimed their portion of the judgment fund, this Court held that the most equitable manner of paying plaintiffs' legal fees and expenses was to charge the entire fund. The method was adopted in preference to an alternative of requiring all bondholders to contribute from the recovery. In supporting the payment of attorneys' fees out of the entire fund, claimed and unclaimed, this Court stated:

> He [the plaintiff] has worked for them [the other bondholders] as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. *To make them a charge upon the fund is the most equitable way of securing such contribution. Id.* at 532 (Emphasis added).

Providing for such a disposition in *Greenough* assures, as here, that both non-claiming and claiming class members bear their costs ratably. To limit the source of plaintiffs' counsel fees to the amount claimed works an inequity to the claiming members of the class, as it is they who will bear the expenses of the non-claiming class members.* Since the fund was created for all class members,

* Such expenses could include other expenses in addition to the legal fees, such as the fees of the Special Master and advertising and printing expenses, all of which have been incurred in an effort to find claimants.

the only equitable method of allocating the expenses of its creation is to charge the entire fund, thereby assuring pro rata sharing by all beneficiaries.*

Central Railroad & Banking Co. v. *Pettus,* 113 U.S. 116 (1885), relied upon by Boeing, is distinguishable. In *Pettus,* a pro rata share of attorneys' fees was charged against each claimant. However, the attorneys for the class apparently limited their request for counsel fees to amounts actually claimed. *Id.* at 125. Accordingly, the issue presented here was not addressed in *Pettus.* Although it approved the type of fee award specifically requested by plaintiffs in *Pettus,* the Court did not withdraw its prior ruling in *Greenough* that ". . . a charge upon the fund is the most equitable way of securing such contribution." *Trustees* v. *Greenough, supra,* 105 U.S. at 532.

In *Sprague* v. *Ticonic National Bank, supra,* one party's establishment of liability against a fund, which could be used by other claimants, was sufficient to charge the fund with legal fees. There, plaintiff in an individual action established liability against a fund, consisting of certain bonds held by a bankrupt bank as collateral for trust funds against which the plaintiff had a claim.

* In allocating fees, courts have historically analogized a fund created for a class to recovered salvage. As stated in *Rosenfeld* v. *Black,* 56 F.R.D. 604, 605 (S.D.N.Y. 1972):

> In this kind of case, as Judge Hough once said, the recovery is "like a case of salvage on a derelict".

Counsel for the class have, in a sense, salvaged a derelict for its owner. In a case of salvage, the salvager is entitled to a salvage fee whether or not the owner claims the derelict. The non-claiming class members are similar to the owner of the derelict who does not claim his boat. The salvaged property is available for the payment of salvage fees. *See Medina* v. *One Nylon Purse Seine,* 259 F. Supp. 769 (S.D. Cal. 1966). (The court ordered salvage fees paid out of the value of recovered property, where the owner was unknown, with the remainder to be deposited into court to await claims, if any, of the owner.)

The benefit conferred was simply the *stare decisis* effect on 13 other *cestuis que trusts* of the judgment obtained by the individual plaintiff. Those 13 others were not before the Court in *Sprague,* resulting in a far less direct benefit than in this case where, in addition to liability, a fund has been created in which class members have an absolute right to share. In *Sprague,* each of the 13 *cestuis que trusts* had to sue to recover a share of the collateral bonds. Fees and expenses were awarded out of the proceeds of the collateral bonds, even though the opinion did not indicate if any other beneficiary having an inchoate claim against the "fund" ever claimed.

The award of a fee from the "fund" in *Sprague* compels the payment of fees from the entire fund here. None of the other potential claimants had in fact made claims against the potential "fund" available in *Sprague,* yet this Court held that equity permitted the individual plaintiff to recover fees and expenses from that "fund". Likewise, the failure here of all class members to claim against the fund does not diminish the power of equity to do justice among the beneficiaries by spreading the expenses ratably among them.

The allowance of attorneys' fees from the entire fund as formulated in *Greenough* and *Sprague* is consistent with the New York Statutory lien of plaintiff's counsel in the entire judgment fund.* Such lien laws are common throughout the United States, and to accept Boeing's position would defeat the lien interest of plaintiff's counsel and subvert the policy behind such legislation.

* This statutory lien is granted by N.Y. Judiciary Law (McKinney 1968) § 475, which provides:

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, *the attorney* who appears for a party *has a lien* upon his client's cause of action, claim or counterclaim, *which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor and the proceeds thereof in whatever hands they may come;* and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. (Emphasis added).

B. *Payment of Counsel Fees From a Common Fund Was Not Limited by* Alyeska *Which Analyzed the Shifting of Fees Upon the Establishment of a Common Benefit.*

Greenough and *Sprague* have been regularly applied by the courts in approving fee awards out of a common fund. *See Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. 240 (1975) and cases cited therein at 257-258. The *Greenough-Sprague* rationale has been applied because it provides the most logical and equitable method for apportioning attorneys' fees.

Looking to a common *fund* as a source for the payment of attorneys' fees requires a different analysis with respect to fee awards than in situations where a common *benefit* is established. By combining the common fund and common benefit doctrines (Br. at 13), Boeing not only confuses two separate lines of analysis, but negates the very real distinction between them.

The common benefit theory is a recent offshoot of the venerable common fund theory recognized by this Court in *Greenough.* As noted in *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 392 (1970):

> Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite

to the court's power to order reimbursement of expenses. (Footnote omitted).

See also Hall v. *Cole, supra.* In *Mills,* a derivative and class action, no monetary benefit was achieved, but because plaintiff's lawsuit prevented a merger of a corporation at an inadequate price, this Court found that not only the shareholders as a group, but the corporation itself was benefited. In *Hall,* an individual action, a member was dismissed from a union for speaking against the union's leadership. His lawsuit led to his re-instatement. Permitting his return into the union was held to have benefited all of its members and the union itself because of the vindication of the members' rights of free speech.

In both instances this Court permitted the fees of counsel for the named plaintiff to be shifted—in *Mills* to the corporation and in *Hall* to the union—because of the benefit to the corporation and its shareholders and the union and its members, respectively. In assessing the fees against the collective entities, this Court determined that the fee was being borne by those who had benefited by the prosecution of the lawsuit. As stated in *Hall, supra,* 412 U.S. at 8-9:

> Thus, as in Mills, [*Mills* v. *Electric Auto-Lite Co.,* 369 U.S. at 397] reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to "the class that has benefited from them and that would have had to pay them had it brought the suit." (Citation and footnote omitted).

The extension of this common benefit doctrine was rejected in *Alyeska* because the shifting of plaintiffs' counsel fees to the defendant therein would have, unlike in *Mills* and *Hall,* shifted the fees to a party who did not benefit

from the litigation. Accordingly, this Court re-affirmed the American Rule that each party pay his own legal fees by limiting the common benefit approach to situations, such as those presented in *Mills* and *Hall,* where the defendant was essentially the beneficiary of the plaintiff's success.

The rejection of the plaintiff's contention in *Alyeska* that payment of its counsel fees be made by the defendant is a far different matter than whether plaintiffs' counsel fees should be paid from a common *fund* which their lawsuit creates. The payment of fees from a common fund proportionately spreads the cost of the litigation only among those who have benefited from its creation, thereby assuring strict compliance with the American Rule that each party bear his own litigation expenses.

That each class member has benefited by the creation of the fund cannot be denied. Clearly, successful prosecution of a lawsuit leading to a judgment and the deposit of all damages, plus interest, is a benefit to each class member. As stated in the decision below, each member of the class has a present vested interest in the judgment which he may receive on request. (A12a). Courts have long recognized an interest in a judgment as a property right with all its attendant benefits. *State of Louisiana* v. *Mayor of New Orleans,* 109 U.S. 285, 291 (1883); *Gilman* v. *Tucker,* 128 N.Y. 190, 204 (1891).

Inherent in *Greenough* was the recognition that all those entitled to take from a common fund have received its benefit. This Court in *Alyeska* re-affirmed that the creation of a fund is a benefit when it specifically made the following reference to *Greenough:*

> To be sure, the fee statutes have been construed to allow, in limited circumstances, a reasonable attorneys' fee to the prevailing party in excess of the small sums

permitted by §1923. In Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1882), the 1853 Act* was read as not interfering with the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, *from the fund or property itself* or directly from the other parties enjoying the benefit.[30]

[30] Mr. Justice Bradley, writing for the Court in *Greenough*, said the following of the 1853 Act:

> "The fee-bill is [not] intended to regulate . . . *power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require.* The fee-bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. Act of Feb. 26, 1853, c. 80, 10 Stat. 161; Rev. Stat., sect. 823. *And the act contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.*" *Alyeska, supra,* 421 U.S. at 257-258. (Citation omitted and emphasis added).

While the Court in *Alyeska* may have limited the newly emerging common benefit theory, this Court, by citing *Greenough* and its progeny with approval, sanctioned the rule in *Greenough* and *Sprague* that charging the attor-

* The opponents to the fee application in *Greenough* sought to limit reimbursement to the limited costs payable under an 1853 Act regulating the amount of costs a losing party was required to pay to a winning party. This contention was rejected as inapplicable by the *Greenough* Court, due to the creation of the common fund.

neys' fees against the entire common fund was the most equitable method of distributing the legal and other expenses.

Boeing's application of the criteria set forth in *Alyeska* as a prerequisite to the award of counsel fees from a common fund is erroneous. The analysis in Boeing's brief (16-19) misreads footnote 39 in *Alyeska* which states, in pertinent part:

> In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs. *Id.* 421 U.S. at 265.

First, as noted in the decision below (A10a), the class here is comparable in size to that of the creditors in *Greenough, supra,* and is smaller than the classes in *Hall, supra* and *Mills, supra.* Second, for the purposes of tracing the benefits accurately, the class membership here is not difficult to identify. Unlike the sprawling throng of potential beneficiaries in *Alyeska,* the Debenture holders in this action are a well-defined class—those who failed to convert. Although the names of each of the individual Debenture holders are not now ascertainable,* the amount owed to each plaintiff can be traced to each Debenture. Unlike *Alyeska,* elementary arithmetic, not "sophisticated

* In large part because of Boeing's conduct during this litigation (see pp. 5-6 and 27-30; *infra*).

economic analysis" is all that is required to determine the proportionate sharing of expenses. Furthermore, the "identification" and "tracing" criteria are met more completely in the instant case than in either *Hall, supra* or *Mills, supra,* neither of which involved monetary benefits.

II

Boeing Has No Right to the Judgment Funds and, Therefore, Payment of Fees From the Fund Will Not Shift Fees to Boeing.

The judgment amount is a common fund created by plaintiffs' attorneys for the benefit of persons other than Boeing. The common fund will be distributed in its entirety to the class, or, in the event of an unclaimed portion, escheat to the State of New York. In no event will any portion of the fund revert to Boeing. *Hansen* v. *United States,* 340 F.2d 142 (8th Cir. 1965); *Pennsylvania R. Co.* v. *United States,* 98 F.2d 893 (3rd Cir. 1938).* Payment of fees from the fund will, therefore, not improperly shift the fees to Boeing.

A. *The Fund Has Vested in the Class Members and Boeing Has No Further Interest Therein.*

In *Hansen, supra,* the defendants depositing funds in satisfaction of a judgment had no further title or right to those funds. The United States had obtained a judgment against Hansen for charging excessive rents in violation of a federal statute. Hansen satisfied the judgment by payment into the General Accounting Office which subsequently transferred the funds to the United States Trea-

* Accordingly, defendants lack standing to appeal from the judgment of the District Court relating to the payment of plaintiffs' attorneys' fees, because it has no remaining monetary stake in the outcome. *O'Shea* v. *Littleton,* 414 U.S. 488 (1974).

sury. Part of the funds deposited remained unclaimed and Hansen moved to reopen the judgment under Fed. R. Civ. P. 60(b)(5) and 60(b)(6) and have the unclaimed portion of the funds returned to him.

In denying the motion on the ground that Hansen had no right to the unclaimed portion, the Court held:

> The defendant consented to the judgment entered against him based upon rentals illegally exacted from named tenants. He has paid such judgment in full and satisfaction thereof has been entered. *Defendant has no title or right to any money he paid to satisfy the judgment. A judgment debtor who has paid his judgment is not the rightful owner of unclaimed portions of the judgment deposited in a trust account in the Treasury pursuant to the statute.* United States v. Klein, 3 Cir., 106 F.2d 213; Pennsylvania R.R. v. United States, 3 Cir., 98 F.2d 893; United States v. Cochrane, 5 Cir., 87 F.2d 3. *Hansen* v. *United States, supra,* 340 F.2d at 143. (Emphasis added).

In *Pennsylvania R. Co.* v. *United States, supra,* a case remarkably similar to the one at bar, the issue of title to the unclaimed portion of a class fund was squarely presented, and resolved against Boeing's contention. There, judgment had been entered against the Railroad in favor of certain bondholders of a subsidiary. In satisfaction of the judgment, the Railroad made payment to the trustee for the bondholders with the instruction that "the trustee . . . make payment to the bondholders whose claims had been proved and . . . deposit the balance of the fund in the registry of the [District Court] . . ." *Id.* 98 F.2d at 894. Eight years after the balance of the judgment had been deposited, the unclaimed funds were transferred to the United States Treasury. Ten years after their transfer,

with a portion of the fund still unclaimed, the Railroad company filed a petition asserting ownership of the remaining funds.

The Court held the Railroad not entitled to the funds because, having been found liable to the individual bondholders, the Railroad had no legal interest in the funds. The court stated:

> When payment of the amount decreed was made by the Railroad Company it was a payment by that company of its indebtedness to the holders of the bonds. *While the payment was made to a trustee for the bondholders the trustee was a mere distributing agent and each of the bondholders acquired title to his pro rata share of the fund.* As the court below pointed out, the situation, *so far as the Railroad Company was concerned, was the same as if it had paid its promissory note to a collecting bank which held the proceeds awaiting the call of the payee. The money with which it made the payment was its money until payment. At that moment, however, title passed to the holders of the bonds. Consequently thereafter the Railroad Company had no more title to the money than it would have had if it had used it to pay any other debt.*
>
> The Railroad Company urges, however, that since no one has as yet claimed the remaining balance of the fund a resulting trust arises in its favor under which the money should be returned to it. With this contention we cannot agree. *As we have said, each of the bondholders received title to his pro rata share of the fund.* Under the provisions of the Act of 1911 the fund may only be paid out to the persons entitled thereto and meanwhile it remains in the Treasury a permanent appropriation for payment to those persons when ordered by the court. *Id.* (Emphasis added).

Defendants here are in the same position. Pursuant to the judgment, Boeing has paid monies into an account at the Chase Manhattan Bank in satisfaction of its liability to the Debenture holders. As shown by *Pennsylvania R. Co., supra,* Boeing has no further claim or title to such money.

Since Boeing has no right to those funds, it lacks standing to complain about their distribution. It has no more title to the fund than it would to money used to pay any other debt. Payment of fees from the fund, therefore, does not shift the fees to Boeing.

B. *Any Portion of the Fund Not Claimed Escheats to New York State.*

New York State is entitled, under its escheat statute, to any funds ultimately unclaimed by class members. N.Y. Aband. Prop. Law (McKinney 1978) § 1200,* *supra.*

The Attorney General of New York has asserted such a claim to the Court below by letters dated April 27 and May 2, 1978.

Defendants' claim that plaintiffs' attorneys are not entitled to fees from that portion of the fund which will at

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* 1200. *Unclaimed property paid or deposited in federal courts.*

All money or other property which shall have been, or shall hereafter be, paid into or deposited in the custody of, or be under the control of, any court of the United States in and for any district within the state, or shall have been or hereafter shall be in the custody of any depository, registry, clerk, or other officer of such court, and the rightful owner or owners thereof either (a) shall have been or shall be unknown for a period of ten consecutive years; or (b) shall have died or shall die without having disposed thereof, and without having left or without leaving a will disposing thereof, and without having left or without leaving heirs, next-of-kin, or distributees; or (c) shall have abandoned or shall abandon such funds or property, are declared to have escheated or to escheat, together with all interest accrued thereon, to and to have become or to become the property of the state.

some later date escheat to New York is totally without merit. The state's right of escheat is a derivative right of succession, rather than an independent claim. The state has no greater rights in the fund than do the individual class members and its right is derived from the class members. *Christianson* v. *King County,* 239 U.S. 356, 370 (1915). In *Application of People of the State of New York,* 138 F. Supp. 661, 666 (S.D.N.Y. 1956), the court stated:

> The state's right of escheat is the right of an ultimate heir; it does not assert a separate claim to the fund but stands in the shoes of those so-called unknown creditors who are deemed to have abandoned their claims. (Citation and footnote omitted).

See also United States v. *Klein,* 303 U.S. 276 (1938) (sustaining the constitutionality of the Pennsylvania escheat statute used by the state to recover unclaimed funds in a bondholders class action; the New York State escheat statute was later, in *Application of People of the State of New York, supra,* found similar to Pennsylvania statute at issue in *Klein.*) The state's interest, not being based upon any independent claim or right to the funds, is dependent upon the underlying rights and liabilities of each non-claiming absentee class member. The fees and disbursements sought by plaintiffs' attorneys should be paid from the entire fund so that all persons having an interest in the fund will bear a ratable share of the expenses incurred in its creation. Only *after* the payment from the total fund of the expenses of administration and plaintiffs' attorneys' fees and disbursements is any class member entitled to his recovery and any third party or stranger, such as a state claiming derivatively by escheat, entitled to assert any rights. To the extent the State of New York acquires any portion of the common fund, it will have been directly benefited by the services of plaintiffs' attorneys.

C. *Final Judgment Has Been Entered in This Case in Behalf of Each and Every Class Member.*

Boeing's arguments that judgments in class actions for damages are not final until individual damages have been claimed and that the $5,749,990.83 deposited by Boeing is not damages awarded but merely the "maximum potential damages of the class" (Br. at 26) ignores the record and the law.

The judgment which was docketed on July 6, 1977 provided as follows:

> ORDERED, ADJUDGED AND DECREED that plaintiffs in behalf of all members of the plaintiff class, which consists of all holders on March 29, 1966 of 4½% Convertible Subordinated Debentures of the Boeing Company who failed to exercise their conversion right before it terminated on March 29, 1966, shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest thereon at the legal rates fixed by the State of New York, N.Y.C.P.L.R. §5001(a) from March 9, 1966 to the date of this judgment, with costs to be taxed . . .(A40a)

The judgment states that "15 days after the entry of this *judgment* the defendants shall deposit the amount of this judgment plus interest . . ." (A41a) (Emphasis added). Thus, the judgment was identified as a judgment of damages to the class (A40a), docketed in the District Court as a judgment, and pursuant to it, Boeing deposited the money. Boeing has never appealed from this portion of the judgment. While the District Court may make further orders respecting the administration of the fund, insofar as Boeing's liability is concerned, the judgment is final and it has no further interest in the amount deposited.

Boeing's argument (Br. 23-25) that individual damages must be proved is an attempt to confuse the substantive law of damages with the procedural necessity for each class member to identify himself. Each of the cases cited by Boeing is an antitrust case where the proof of damages involved is that required by the antitrust statutes as an element of the case to be proved at the trial. Whereas damages need be proved in the first instance, here no class member need prove his damages because damages have already been established and membership in the class entitles each class member to an identical amount of damages for each Debenture.

Boeing's citation of cases in which class certification was denied (Br. at 23-25) is inapposite, as those cases were grounded on amorphous, multi-year antitrust classes, involving sometimes millions of potential class members,* as distinguished from the narrow, precise class here. Furthermore, references by Boeing to actions in which class certification was denied are fatuous as it was *Boeing itself which moved for class certification in this action.* Furthermore, as this case was certified as a Fed. R. Civ. P. 23(b) (1) and (b) (2) action, this judgment is irrevocably binding on all class members, present or not. *Mungin* v. *Florida East Coast Ry. Co.,* 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd,* 441 F.2d 728 (5th Cir.), *cert. denied,* 404 U.S. 897 (1971); *Green* v. *Wolf Corp.,* 406 F.2d 291 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969). Having originally sought to obtain the benefit of class certification, Boeing now seeks to avoid what it perceives to be the detrimental

* *See, e.g., In re Hotel Telephone Charges,* 500 F.2d 86, 88 (9th Cir. 1974) (40 million potential class members); *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1008 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974) (6 million class members, over 4 years); *Boshes* v. *General Motors Corp.,* 59 F.R.D. 589 (N.D. Ill. 1973) (30-40 million class members, over 4 years).

aspects of such certification. This "head I win, tails you lose" argument deserves condemnation by this Court.*

Furthermore, Boeing's reference to a so-called "fluid recovery" is meaningless. No claim is now made for payment to any class member of one cent more than the amount by which he himself was injured by Boeing. Each class member will be compensated by his pro rata share of the judgment. As a result, payment from the entire judgment of each class member's share of counsel fees and other expenses, assures a proportionate payment by each class member who benefited from the creation of the common fund.

III

Even if Boeing Still Has an Interest in the Unclaimed Portion of the Judgment, Plaintiffs' Counsel Fees Should Be Charged Against the Entire Judgment Fund Because of Boeing's Bad Faith During the Course of This Litigation.

If this Court views (a) only the amount claimed and not the entire judgment fund as a common fund and (b) the unclaimed portion as Boeing's property, the fees of plaintiffs' counsel should be paid from the entire judgment fund as Boeing has, during the course of this litigation, "acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . ." *Alyeska, supra,* 421 U.S. at 258-

* Boeing's citation (Br. at 20) of the Advisory Committee Note to Rule 23 in 39 F.R.D. 69, 98-107 (1966) also ignores the very real difference between a judgment in a 23(b)(1) or (b)(2) action such as this and a 23(b)(3) action. Thus, the same Advisory Committee Note itself stated:

> In a (b) (1) or (b) (2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b) (3) action the judgment "specifies" the individual members who have been identified and describes the others. *Id.* at 105.

259 (citing *F.D. Rich Co.* v. *United States, Industrial Lumber Co.*, 417 U.S. 116, 129 [1974]).*

Boeing deliberately discouraged debenture holders from preserving their rights. Boeing maintained throughout the litigation that class members who redeemed after the expiration of the conversion deadline, 85% of all class members, waived any right to damages. Early in the litigation counsel for the plaintiffs attempted to enjoin Boeing from notifying redeeming class members that a redemption would be a waiver of their right to damages. Judge Ryan declined to enjoin Boeing from mailing the notice, although he indicated, but did not rule, there was no waiver. Judge Ryan also indicated each class member's right to damages would be preserved. *See* Transcript of hearing before Hon. Sylvester J. Ryan, September 19, 1966. Notwithstanding this indication, Boeing notified the redeeming bondholders of the claimed waiver. The District Court eventually ruled years later that there was no waiver, but Boeing failed to notify those it had previously misled that its waiver position had been rejected. Boeing's gratuitous and self-serving waiver advice undoubtedly discouraged many redeeming Debenture holders from maintaining contact with Boeing or class counsel.

Besides actions aimed at discouraging the Debenture holders, Boeing's acts caused the loss of identity of many Debenture holders. Many Debentures belonging to the class were redeemed through banks and brokerage houses. It would have been a simple matter for Boeing to advise the banks and brokerage houses to preserve the names of the redeeming customers. By failing to so notify the banks

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* As *Alyeska* noted, fee shifting is a recognized exception where the defendants have acted in bad faith. Fee shifting is only involved here to the extent that a portion of the fee is paid from unpaid funds which may be adjudicated to be owned by Boeing.

and brokerage houses, which destroyed certain of their records as a routine matter due to the passage of time, or taking other steps necessary to preserve the names and addresses until the conclusion of this lawsuit, Boeing acted in bad faith. Boeing obviously had no interest in preserving rights of class members. Boeing's bad faith has therefore caused the names of numerous class members to be lost, rendering impossible their sharing in the judgment. Such conduct is especially vexatious if Boeing intended to argue now that expenses should be borne only by claimants. For Boeing to claim the benefit of its bad faith flies directly in the face of *Alyeska* and *Rich, supra.*

This action is similar to *Vaughan* v. *Atkinson,* 369 U.S 527, *rehearing denied,* 370 U.S. 965 (1962), cited in both *Alyeska* and *Rich.* In *Vaughan,* a seaman notified a ship owner of certain alleged claims. The owner made no effort to investigate the seaman's claims until suit was brought. As a result, the seaman was required to hire an attorney, agreeing to pay the attorney a 50% contingent fee.

In imposing the seaman's counsel fees on the ship owner, this Court found:

> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one. *Vaughan* v. *Atkinson,* 369 U.S. at 530-531. (Footnote omitted).

Just as the owner refused to investigate the libellant's claim in *Vaughan,* Boeing failed to preserve the names of

potential claimants, thereby callously insuring that the erosive effects of time would destroy their rights. Here, as in *Vaughan,* Boeing's bad faith after the accrual of the cause of action was harmful to plaintiffs. The conduct of Boeing is far worse than defendant's in *Vaughan* since rights here may have been completely destroyed by Boeing's conduct. It is difficult to imagine a clearer case of bad faith and wanton disregard for the rights of absent members of a class than here presented. Accordingly, even if Boeing is ultimately adjudicated to be the owner of the unclaimed funds, counsel fees should be awarded from the entire judgment fund so that Boeing does not receive a windfall because of its conduct.

IV

Failure to Award Fees From the Entire Fund Will Result in Unfairness to the Class and Delays in the Termination of Class Actions.

Courts have decried those class actions commenced as "strike suits" or "lawyer's suits" for the purpose of forcing settlement with no real hope of prevailing on the merits. *See, e.g., Reiter* v. *Sonotone Corp.,* —— U.S. ——, 99 S. Ct. 2326, 2334 (1979) (Rehnquist, J., concurring). If there is any class action which is not a "lawyer's suit", this is the case.

As noted in the decision below, if legal fees were charged only to claiming class members, "the standards evolved by the Courts of Appeals to ensure rationality and fairness in fee setting would go for nought . . ." (A14a). The present rule* that the attorneys' fees should be set at a

* *See, e.g., City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448 (2d Cir. 1974); *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.,* 487 F.2d 161 (3rd Cir. 1973); *Grunin* v. *International House of Pancakes,* 513 F.2d 114 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975). As this Court has recently noted in other contexts, discretion should be given to the District Court familiar with the litigation. *See, e.g., Parklane Hosiery Co.* v. *Shore,* —— U.S. ——, 99 S. Ct. 645 (1979) (application of collateral estoppel) and *Douglas Oil of California* v. *Petrol Stops Northwest,* —— U.S. ——, 99 S. Ct. 1667, 1678 (1979) (permission for counsel in civil litigation to review grand jury documents). In the case at bar the discretion given to the District Court relates to the amount, but not the source, of counsel fees.

sum rationally calculated by considering such factors as the hours spent, hourly rates, the difficulty of the case, and the quality of representation, would be unworkable if the fee was charged only to the portion of the fund claimed. In suits where a relatively small number of claimants appeared, the attorney's fee could leave those claimants with a smaller recovery. In the instant case, where each Debenture holder has an economically significant interest, deducting attorneys' fees only from the claimed portion may leave each plaintiff with very substantially reduced benefits. Such a result could indeed make this a "lawyer's lawsuit", *Van Gemert III, supra,* 573 F.2d at 735. Furthermore, the fears of the courts that class members are not being treated fairly would be realized if only the claiming class members paid for the creation of the entire judgment fund. *See, e.g., Grunin* v. *International House of Pancakes, supra,* 513 F.2d at 127.

Based on the history of this case, Boeing's contention that limiting the fees to the amount claimed will limit class actions in which the attorneys are the beneficiaries while simultaneously protecting "meaningful" class actions, is, at best, disingenuous. To further suggest, as does Boeing here, that an award of fees only from the claimed fund will insure that attorneys will be compensated only for the benefits they have conferred and will prevent the proliferation of attorneys' cases, is absurd.

No one can dispute the creation here of a substantial benefit for the members of the class; no one can claim here that class counsel is the only beneficiary of the judgment.

Furthermore, Boeing's claim that the instant case will insure the proliferation of litigation and the protraction of litigation after the class members have lost interest is untrue. On the contrary, to award fees only out of the amount ultimately claimed would stimulate defendants to delay, for as long as possible, with the hope that after years of litigation many claims (and plaintiffs' attorneys' fees) would be minimized and all unclaimed amounts recaptured by the defendants.

Boeing's other suggestion that in settlement cases a different rule would apply (Br. at 19, n.) is undesirable. A rule providing for fees to be paid only from amounts claimed in a fully litigated action, but not in settled actions, would be a signal to defendants to go to trial and prolong the litigation, as has happened here, with the hope that plaintiffs and claims would wane with the passage of time—thereby reducing any amount actually and ultimately paid by the defendants.

A rule such as that proffered by Boeing only promotes the financial interests of the defendants. It does not advance or safeguard the rights of the victims of defendants' actions and it certainly does not advance those of the courts.

This case demonstrates the class action procedure serving the interests of the Court by consolidating a number of separate actions by numerous parties, all of whom had been substantially damaged by one transaction. A significant amount of court time was saved by this consolidation. This action is hardly a "lawyer's lawsuit" but instead a hard-fought, law making, protracted litigation which resulted in a complete recovery for the class.

In this action, plaintiffs' counsel have performed their obligations to the class and to the Courts in the highest tradition of the legal profession. To the extent there are abuses in class actions, this case is no such example. To penalize claimants because of the inability of the court-appointed Special Master to find persons thirteen years after this litigation arose, and years after relevant records were destroyed because of Boeing's failure to properly notify banks and brokerage houses to preserve those records, would not only be inequitable, but would, in fact, encourage defendants in class actions to protract the litigation and thereby congest the courts with cases.

CONCLUSION

The judgment of the Court of Appeals (*en banc*) should be affirmed.

Dated: New York, New York
July 27, 1979

Respectfully submitted,

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1327

THE BOEING COMPANY
(formerly The Boeing Airplane Company), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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IN THE

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THE BOEING COMPANY

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WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

This reply brief is submitted by Petitioners, The Boeing Company, *et al.* ("Boeing"), in reply to separate briefs filed on behalf of the Respondents in this case by attorneys Stuart D. Wechsler ("Wechsler") and Norman Winer ("Winer").

ARGUMENT

I

As to Respondents' Contention That the Common Benefit Doctrine, Set Forth in *Trustees* v. *Greenough* and *Central Railroad & Banking Co.* v. *Pettus*, Permits an Award of Attorneys' Fees Without Regard to the Degree of Unjust Enrichment That Results From the Attorneys' Actions.

As set forth in Boeing's main brief at 13-14, the rationale of the common benefit corollary to the American Rule on attorneys' fees is that when one person brings a suit at his own expense which results in the enrichment of others as well as himself, it would be unjust to allow these others to pocket their gains without paying a portion of those gains to help defray the legal bills of the individual who created them. Some enrichment is a precondition to the operation of this doctrine because it is only when someone is enriched that there is an inequity for a court to remedy.

Notwithstanding this logic, respondents and the *en banc* majority of the Court of Appeals attempt to extend the common benefit doctrine so that attorneys' fees can be awarded in the complete absence of enrichment, thus stripping this doctrine of its purpose and the prerequisite for its application. This Court has never followed such a course, but instead has consistently reaffirmed and relied on the unjust enrichment rationale for the common benefit doctrine.

A. This Court in *Greenough* Relied on the Principle of Unjust Enrichment

In discussing *Trustees* v. *Greenough*, 105 U.S. 527 (1882), Wechsler at 11-12, and the *en banc* majority opinion at 11a, point out that not all the bondholders in that case had yet cashed in their bonds and so had not yet reaped

the benefit of plaintiff's lawsuit. Wechsler at 12 attempts to elevate this fact to a holding by this Court that whether anyone benefits from a lawsuit is irrelevant to whether attorneys' fees can be collected from a fund on which a lawsuit has had some effect.

The fact that all the bondholders had not *yet* benefited, however, was not decisive to this Court in *Greenough*. The decisive fact was that, unlike the non-claiming class members in the instant case, the bondholders in *Greenough* would all *eventually* benefit, as "[t]he administration of the fund for the benefit of the bondholders" would continue as long as there were payments to be made "in payment of coupons still unsatisfied." 105 U.S. at 531. This Court held in *Greenough* that the plaintiff's successful prosecution of a suit on behalf of others to protect a fund was *not* alone enough for him to get attorneys' fees from that fund. It was *also* necessary that the purported beneficiaries "participated in the benefits resulting from [the plaintiff's] proceedings." 105 U.S. at 532.

The attorneys' fees, then, were not taken from the fund simply because there was a fund. They were taken because those who would in fact benefit from the fund would otherwise be unjustly enriched:

> "[I]t cannot be just that in such a suit . . . one alone should bear the burden, when others have the benefit."

105 U.S. at 534, *quoting Thompson* v. *Cooper*, 2 Collyer 87, 90-91, 63 Eng. Rep. 649, 650 (Ch. 1845). This rationale cannot be reconciled with the version of *Greenough* advocated by the *en banc* majority and the Wechsler brief.*

* Winer at 8 makes a similar argument. The cases cited there are inapposite on this point. *Swanson* v. *American Consumer Industries,*

(footnote continued on following page)

B. This Court in *Pettus* Allowed Attorneys' Fees Only From Claims Actually Filed, and Hence Only From Individuals Who Would Otherwise Have Been Unjustly Enriched

Central Railroad & Banking Co. v. *Pettus,* 113 U.S. 116 (1885), is similarly misinterpreted by the respondents. Wechsler at 13 and Winer at 9-10 admit that the plaintiffs and their attorneys in *Pettus* understood that, under the law, the attorneys could only request contribution to their fees from creditors "who accepted the fruits of [the attorneys'] labors by filing claims." 113 U.S. at 125. The respondents argue, nevertheless, that the *Pettus* Court did not approve this statement of the law. In fact, however, after summarizing the evidence, the *Pettus* Court held that if the plaintiffs themselves had agreed to pay their attorneys and had then sued for,

> "such reasonable compensation . . . as the court might allow, in respect of other creditors *filing claims,* the case, it could not well be doubted, would come within the very letter of the decision in *Trustees* v. *Greenough.*"

113 U.S. at 126 (emphasis added).

(footnote continued from preceding page)

517 F.2d 555 (7th Cir. 1975) is a stockholders' derivative suit governed by *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). The rationale of these actions is that the corporation is the beneficiary of suits by stockholders on its behalf and therefore should pay the cost of such suits when they succeed.

City of Detroit v. *Grinnell Corp.,* 495 F.2d 448 (2d Cir. 1974), is a settlement case. Such cases are not apposite to the situation before this Court because the parties to a settlement can provide for attorneys' fees from the settlement fund in any way they can agree to, subject to court approval. *E.g., Beecher* v. *Able,* 575 F.2d 1010, 1016 n.3 (2d Cir. 1978); *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1012 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974); *City of Philadelphia* v. *American Oil Co.,* 53 F.R.D. 45, 71 (D. N.J. 1971).

The question in *Pettus* was simply whether that compensation from beneficiaries who filed claims, which *Greenough* had held could be gained by the successful plaintiffs suing on behalf of their attorneys, could also be gained by the attorneys suing the claimants directly. This Court held that "the present case is embraced by the reason of the rule announced in *Trustees* v. *Greenough.*" 113 U.S. at 126. There can be no doubt, then, that this Court in *Pettus* was interpreting *Greenough* to allow payments to attorneys directly from funds recovered, but only to the extent that beneficiaries of those funds actually "fil[ed] claims." 113 U.S. at 126. There was no reason in *Pettus* to alter the unjust enrichment rationale of *Greenough* just because the attorneys, rather than their clients, were suing directly for attorneys' fees.

Applying the *Greenough-Pettus* rationale to the case now before this Court, there can be but one result. Those who are in fact enriched by this lawsuit should pay a portion of their gains to the attorneys who made those gains possible. The respondents' claim, Wechsler at 12, that this result "works inequity to the claiming members of the class, as it is they who will bear the expenses of the nonclaiming class members," is nothing more than a perversion of the common benefit doctrine. Since it is only claiming class members who gain *anything* from this lawsuit,* it is entirely equitable to spread the cost of the lawsuit among them.

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* The class as a whole does not benefit, because that would mean a fluid class recovery in violation of *Van Gemert II,* 51a-52a and *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1018 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974). The respondents argue, without support either in law or in the record of this case, that a state may take some unclaimed funds by escheat. Even if this were true, however, these states would not be beneficiaries of this action within the meaning of the common benefit doctrine.

(footnote continued on following page)

C. This Court in *Sprague* v. *Ticonic National Bank* Adhered to the Unjust Enrichment Rationale

In *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), the other case relied on by respondents, Wechsler at 13-14, and the *en banc* majority of the Court of Appeals, 11a, this Court adhered to the unjust enrichment rationale in applying the common benefit doctrine set forth in *Greenough* and *Pettus*. No explicit discussion of the unjust enrichment rationale was undertaken in *Sprague*. Rather, it was assumed, as was natural on the facts of that case, that all fourteen beneficiaries of the plaintiff's action would eventually claim their benefit. As this Court explained the *Sprague* holding in *Hall* v. *Cole*, 412 U.S. 1, 5 n.7 (1973):

> "In reaching this result, the [*Sprague*] Court explained that the beneficiaries of the plaintiff's litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries eventually *would* recover." (emphasis added).

The additional broad *dicta* concerning the powers of an equity court to grant attorneys' fees that appears in *Sprague* has been disapproved by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240,

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(footnote continued from preceding page)

This is true both because they would not be intended beneficiaries of respondents' lawsuits, *Hobbs* v. *McLean*, 117 U.S. 567, 581-82 (1886); *Gabrielson* v. *City of Long Beach*, 56 Cal. 2d 224, 363 P.2d 883, 886-87, 14 Cal. Rptr. 651, 654-55 (1961) (Traynor, J.), and because these states could only benefit through the independent efforts of their own lawyers, *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345, 351 (5th Cir. 1966); *Nolte* v. *Hudson Navigation Co.*, 47 F.2d 166, 167-68 (2d Cir. 1931); *In re Estate of Korthe*, 9 Cal. App. 3d 572, 88 Cal. Rptr. 465, 467-68 (1970); *In re Loomis*, 273 N.Y. 76, 81, 6 N.E.2d 103, 105 (1937).

258 n.30 (1975), as set forth in Boeing's main brief at 15-16. Moreover, as Professor Dawson points out, "no such extravagant notions were required, since all the claims of fourteen identified persons" were directed against "clearly segregated specific bonds [which had been] declared . . . subject to an express trust. All that needed to be said was that the court's receiver, who had acquired custody of these and other assets of the bank, had both the means and the duty to insure that all fourteen beneficiaries of the trust were treated alike." Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 Harv. L. Rev. 1597, 1610-11 (1974).

II

As to Respondents' Contention That the Criteria for Application of the Common Benefit Doctrine Set Forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society* Apply Only in Cases Dealing With a Non-Monetary Benefit.

The criteria for application of the common benefit doctrine set forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) are applied to the instant case in Boeing's main brief at 16-19. These criteria embody the unjust enrichment rationale that respondents seek to avoid. Respondents therefore vainly contend that these criteria do not apply to them because *Alyeska* did not involve a direct monetary benefit. Wechsler at 15-17; Winer at 13-14. Respondents argue that the rationale for attorneys' fees in non-monetary benefit cases emerged full-blown in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), *Hall* v. *Cole*, *supra*, and *Alyeska*, and has no link to the older cases involving monetary benefits.

Respondents' argument is without substance. First, as has been seen, this Court's monetary-benefit cases are soundly tied to an unjust enrichment rationale. Second, this Court in *Alyeska* explicitly stated that the criteria for application of the common benefit doctrine applied to both "common-fund and common-benefit decisions". 421 U.S. at 265 n.39. Finally, the way in which the rationale of the monetary benefit (common fund) cases was extended to non-monetary benefit cases was explained by this Court in *Hall* v. *Cole*, 412 U.S. 1 (1973).

The common benefit exception is described in *Hall* as having "its origins" in the common fund cases "which have traditionally awarded attorneys' fees to the successful plaintiff when [1] his representative action creates or traces a 'common fund,' [2] the economic benefit of which *is* shared by all members of the class." *Id.* at 5 n.7 (emphasis and bracketed numerals added). *Accord, Mills* v. *Electric Auto-Lite Co., supra,* 396 U.S. at 392. This two-fold requirement of successful representation which results in actual enrichment can be directly traced to this Court's opinion in *Greenough.* The Court in *Hall* continued that "the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation 'which corrects or prevents an abuse which would be prejudicial to the rights and interests' of those others," 412 U.S. at 5 n.7, *quoting, Mills* v. *Electric Auto-Lite Co., supra,* 396 U.S. at 396.

Thus, contrary to respondents' arguments, the unjust enrichment rationale dates back to the monetary-benefit cases of *Greenough* and *Pettus,* and was simply extended by this Court to non-monetary benefits. Respondents' fruitless attempt to separate the monetary from non-monetary benefit cases illustrates their lack of comprehension of the rationale for these doctrines.

III

As to Respondents' Alternative Contention That Non-Claiming Class Members Have Received a Benefit in This Case.

In the alternative, respondents argue that even if enrichment is required by the common benefit doctrine, non-claiming class members have been enriched because the class attorneys have given them an ephemeral right to receive a share of the recovery. Wechsler at 17; Winer at 14. But this case is concerned only with money that remains unclaimed. Thus it is not concerned with the benefit given to class members who had a right to receive a share of the recovery and exercised it. It is only concerned with the benefit given to class members who have such a right but will *never* exercise it. It is therefore concerned only with rights which are by definition worthless. Only through bootless sophistry can respondents contend that class members who receive such a "right" are unjustly enriched. Given the unjust enrichment rationale for the common benefit doctrine, the conclusion that non-claiming class members receive no benefit is unavoidable.*

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* As if anticipating failure on the common benefit corollary to the American Rule on attorneys' fees, and in a transparent attempt to find some basis for compensation without facing the issues in this case, Wechsler at 27-30 claims for the first time in this litigation, and without a shred of support in the record, that Boeing's "behavior", essentially its decision to issue the debentures in bearer form, warrants an award of attorneys' fees under the bad faith exception to the American Rule. No court in the course of this litigation has ever suggested bad faith on Boeing's part. The record in this case reveals that respondents' accusation is entirely without merit. *See, e.g., Van Gemert I,* 77a & n.23; Case Note [on *Van Gemert I*], 89 Harv. L. Rev. 1016, 1024-27 (1976).

Further, this argument should not be considered by this Court, because it was not raised below or contained in the questions presented to this Court. *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317, 330 (1967); *J.I. Case Co.* v. *Borak,* 377 U.S. 426, 428-29 (1964).

IV

As to Respondents' Contention That Individual Injury Need Not Be Shown Before a Judgment For Damages May Be Had.

Point II of Boeing's main brief at 19-26 presents as an alternate ground for this Court's decision the proposition that because no judgment against Boeing exists for the money due to class members who never claim it, it is only the final amount of claimed funds that constitutes the benefit from which plaintiffs' attorneys can extract their fee. No judgment against Boeing for unclaimed funds exists because class actions, like other civil actions, exist to compensate individual injury, and hence in class actions, as in other civil actions, individual damages must be claimed before they can be assessed against a defendant.

Respondents do not attack this argument directly. They do not cite or discuss authorities on the requirements of non-class actions, they do not cite or discuss this Court's cases holding that class actions must meet the same requirements unless Federal Rule of Civil Procedure 23 otherwise provides, and they do not discuss the holdings or reasoning of the many lower court class action cases, cited in Boeing's main brief at 24-25, which have recognized the need for individual proof of damage by class members in the course of denying class certification.

Instead, respondents try to meet Point II of Boeing's main brief with only unsupported assertions and arguments that assume away the authorities cited by Boeing without facing them.* Without examining the nature of a class

* It is also asserted in passing, Wechsler at 25, that Boeing did not appeal from that sentence of a district court order which stated the total damages that might be collected by class members. Of course

(footnote continued on following page)

action judgment, respondents appear to believe, with the *en banc* majority of the Court of Appeals, that such a judgment is "the spoils of . . . victory," 15a, which can be dipped into at will.

A. Individual Injury Must Be Shown in Non-Class Actions

Wechsler at 26 asserts that even in non-class actions a plaintiff need not show the fact that he has been injured in order to recover unless he sues under the antitrust laws. This astonishing statement is unfettered by authority of any kind. It also sweeps away a basic proposition of Anglo-American law.

Under the antitrust laws, as with various other statutes, damages are part of the cause of action to be proved at trial. The point at issue in the instant case, however, is not whether damages are part of respondents' cause of action. Respondents could recover nominal damages simply by proving that Boeing committed a legal wrong. Rather, the principle stated in Boeing's main brief is that before a plaintiff can recover anything *beyond* nominal damages, he must establish with some degree of certainty that he personally has sustained the damages for which he seeks recovery. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946); *Palmer* v. *Connecticut Railway & Lighting Co.*, 311 U.S. 544, 561 (1941) ("Certainty in the fact of damage is essential."); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), *citing*

(footnote continued from preceding page)

Boeing did appeal from that order, set forth at 39a-42a, and that appeal is presently before this Court. Moreover, the portion which respondents claim Boeing should have specifically highlighted in its appeal is a purely formal paragraph, containing simply a statement of liability and a total amount of damages which had to be stated before any individual class member's damages could be calculated.

Taylor v. *Bradley*, 39 N.Y. 129, 4 Abbott Dec. 363 (1868); T. Sedgwick, *Measure of Damages* § 170 at 317-18 (9th ed. 1912) ("A party who claims compensation for a legal injury must show, as part of his case, that he has suffered a loss through the injury"); 1 J. Joyce & H. Joyce, *Treatise on Damages* §§ 2, 75 (1903).

B. Individual Injury Must Be Shown in Class Actions

The requirement that individual injury be shown before damages are recovered applies equally to class actions. This Court's admonitions, cited in Boeing's main brief at 21-22, that the substantive requisites of sustaining a claim against another party are unchanged in class actions except as set forth in Federal Rule of Civil Procedure 23, support the existence of such a requirement. *See, e.g., Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 470 (1978). Respondents do not cite, much less discuss, these cases.

The lower court class action cases cited in Boeing's main brief at 24-25 also support this requirement. All of these cases recognized in denying class certification that "[Rule 23] does not eliminate the ultimate need for individual proof of damages by each member of the class." *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 236 n.8 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The same result was reached in a recent district court case in which the plaintiff class prevailed on a securities law claim, and it was held both that attorneys' fees would come only from the amount claimed by the class and that "any amount of the damage award which is not claimed . . . will be returned to the [defendant] corporation." *Elkind* v. *Liggett & Myers, Inc.*, 472 F. Supp. 123, 130, 134 (S.D.N.Y. 1978). Hence, like the cases cited in Boeing's main brief, the *Elkind* court recognized that judgment against a defendant could not be had for amounts owing to class members who never claim.

Respondents' only attempted distinction of these cases is that *some* of them involve larger classes than the case at bar. Wechsler at 26. No reason is or can be given why a substantive requisite of sustaining a claim in a class action should depend on the size of the class.*

C. Whether a Class Action Is Certified Under Rule 23(b)(1) or Rule 23(b)(3) Is Irrelevant to Whether Injury Must Be Shown

Respondents also suggest that some distinction favorable to them should result from the fact that the instant case was certified as a class action pursuant to Rule 23(b)(1) rather than Rule 23(b)(3). Wechsler at 26-27; Winer at 10-11. The effect of this difference on whether or not class members must prove individual injury is not evident, and respondents provide no enlightenment. The two sections differ as to collateral estoppel effect on future actions, but there is and can be no distinction in the quantum of proof required of class actions certified under these two subsections. Indeed, a class action can be certified pursuant to both these subsections at once. *E.g., Richardson* v. *Hamilton International Corp.*, 62 F.R.D. 413, 423 (E.D. Pa. 1974).

D. Precedents Involving the Disposition of Money Irrevocably Paid Into Court in Non-Class Action Cases Are Irrelevant

Respondents' other attempts to deal with Boeing's position consist of assuming it away. Wechsler at 20-24 cites non-class action cases for the propositions that defendants have no right to money that has been irrevocably paid in satisfaction of a judgment, and that abandoned property escheats to a state. Boeing's point, however, is that money

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* If there were to be a distinction, it is the large class action, and not the small one, which may be most in need of an exception to requirements of individual proof.

due to non-claiming class members has not been irrevocably paid to, or abandoned by, anyone. Respondents' authorities do not address, much less resolve, this issue. These precedents are irrelevant as long as "[a plaintiff has] no direct right to the fund, and its disposition [is] entirely within the discretion of the same court that created it." *Williametz* v. *Susi,* 489 F.2d 364, 366 (1st Cir. 1973). In this case, as Point II of Boeing's main brief makes clear, class members have no direct right to funds until they make claims.*

V

As to Respondents' Contention That Failure to Award Attorneys' Fees From Unclaimed Funds Would Be Unfair to Class Attorneys and to the Class.

Respondents and the *en banc* majority of the Court of Appeals finally argue that taking class attorneys' fees only from funds claimed by the class is unfair both to the class attorneys and to their clients. 14a-16a; Wechsler at 30-33; Winer at 16-17. This argument depends on a unilateral view of fairness that cannot withstand analysis.

As to the class attorneys, it is apparent that the concern expressed for "rationality and fairness in class action fee setting," 14a, Wechsler at 30-31, is one-sided. Factors such

* Respondents' contention that the New York attorneys' lien law, N.Y. Judiciary Law § 475 (McKinney 1968), proves their case, Wechsler at 14-15n.; Winer at 11-12, also begs the question before this Court. The class attorneys, under New York law, may well have a lien in the amount of their fee on the fund from which that fee is taken. The question in this case, however, is how large the fund from which those fees are taken will be. The attorneys' lien law does not resolve this substantive question, as the New York courts have held. *McGinn* v. *Poston,* 62 App. Div. 2d 262, 264, 404 N.Y.S. 2d 906, 908 (3rd Dep't 1978).

as the hours spent or the difficulty of the case pale into insignificance beside the ultimate question that any attorney must answer from his client: what benefit has been achieved. Yet the *en banc* majority states that whether a lawsuit benefits anyone is a "purely fortuitous event" and the respondents do not mention the idea of benefit at all. The "rationality" that they would bring to fee setting does not extend to this central factor.

As to the claiming class members, respondents and the *en banc* majority argue that these class members' claims would be reduced by an unwarranted amount if class attorneys' fees are taken only out of claimed funds. This reduction, however, is not greater in degree than the reduction in the recovery of any plaintiff whose lawyer represents him for a contingent fee. Indeed, the class action device, with fees taken only from claimed funds, acts to limit this reduction. One of the class attorneys in this case, for example, originally brought suit on behalf of clients with potential damages of approximately $50,000. Winer at 5. Because those clients have succeeded in a suit on behalf of a class which has now claimed over $3,000,000 in damages,* those clients' recoveries will be diminished to a far lesser extent than would otherwise have been the case. As to lawsuits in which few class members with very small damages claim, Boeing submits that the risk of diminished reward in these circumstances is appropriately borne by class attorneys, and that this factor will bring into balance the benefits actually achieved with the fees actually awarded.

The third fairness consideration in this case, unremarked by either respondents or the *en banc* majority, is fairness to

* This figure is based on the facts stated in the *Amicus Curiae* Brief of the Special Master. Total class damages with interest amount to approximately $7,000,000, *id.* at 6, and owners of approximately 46% of the total number of debentures have now submitted claims, *id.* at 4, 14.

a class action defendant. The American Rule on attorneys' fees is meant to avoid the burden placed by other nations on losing litigants for having prosecuted or defended a lawsuit. Boeing submits that class action defendants are equally in need of the protection provided by the American Rule.

CONCLUSION

The arguments of the respondents are without merit. Boeing respectfully submits that the judgment of the Court of Appeals (*en banc*) should be reversed.

Dated: New York, New York
November 8, 1979

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979
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Respondents.

ON WRIT OF CERTIORARI TO THE
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FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF SPECIAL MASTER

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STATEMENT

This brief is submitted to aid the court in its review of the judgment entered on December 21, 1978 by the United States Court of Appeals for the Second Circuit, sitting en banc reversing the decision of a panel of that court, and affirming a judgment of the United States District Court for the Southern District of New York which ordered that Respondents' attorneys be awarded their fees, expenses and disbursements from the total amount of the judgment rendered against the Petitioners.

BACKGROUND

On July 15, 1958 each shareholder of The Boeing Company ("Boeing") was given the right to purchase $100 of convertible de-

bentures for each 23 shares of stock then held. The debentures were to pay interest of 4-1/2 per cent per annum and were to be convertible by the debentureholders into common stock at a rate (subject to adjustment) of two shares per $100 principal amount of debentures. The Chase Manhattan Bank, N.A. ("Chase") was appointed trustee under the Indenture Agreement. $30,597,600 aggregate amount of unregistered debentures in units of $100, $500, and $1,000 were issued. (No list of the persons to whom the debentures were issued was kept by Boeing or Chase.)

In February 1966, Boeing called the debentures for redemption. April 8, 1966 was fixed as the redemption date and March 29, 1966 was set as the date for

expiration of the conversion privilege. All but the holders of $1,544,300 in debentures were converted by the deadline of March 29, 1966. Thereafter, these non-converting debentureholders brought a consolidated class action in the United States District Court for the Southern District of New York. On July 8, 1977 a Judgment and Order was entered in favor of the Respondents herein, in the principal sum of $3,289,359 together with interest thereon from March 29, 1966 to the date of judgment which amounted to $2,459,646.83 for a total of $5,749,005.83.

That sum was invested on July 21, 1977 in a Certificate of Deposit and designated the Judgment Fund. On October 21, 1977,

$272,613.79 was transferred from the Chase redemption and interest account to the Judgment Fund. An additional $360,040.56 was deposited in the Judgment Fund on December 23, 1977. This deposit included $204,496.43 representing interest on Boeing's unredeemed debentures, $145,851.18 in payment of interest on debentures which had been redeemed since March 29, 1966 and interest of $9,692.95 on the latter two amounts from July 6, 1977. The following is a summary of the sums deposited in the Judgment Fund, interest earned thereon and withdrawals therefrom as allowed by the Court:

Deposits to the Account:		
Boeing Deposit 7/21/77		$5,749,005.83
Transfer from Chase interest A/C 10/21/77		5,867.40
Transfer from Chase redemption A/C 10/21/77		266,746.39
Boeing Deposit 12/23/77		360,040.56
		6,381,660.18
Income Earned on Investments		939,621.91
		7,321,282.09
Less: Payments for Redemption of Bonds and Coupons		204,168.29
		7,117,113.80
Disbursements from the Account:		
Special Master	$58,345.00	
Chase (Services)	3,166.22	
United Service (Printing)	2,747.92	
Doremus & Co. (Advertisement)	49,023.20	113,282.34
Balance 7/18/79		$7,003,831.46

Analysis of Current Balance

Amount	Maturity	Security
$6,885,790.97	7/26/79	Chase Certificate of Deposit 9.625%
109,762.88	8/17/79	Chase Certificate of Deposit 9.70%
8,277.61	-	Cash
$7,003,831.46		

SPECIAL MASTER

Pursuant to the Judgment and Order of the District Court dated July 6, 1977, the undersigned was appointed Special Master and vested with the following powers:

> ...all the powers enumerated in Rule 53 of the Federal Rules of Civil Procedure to direct the parties in the necessary ministerial steps to effectuate the Judgment, receive all proofs of claim to participate in the Fund established by the Judgment, pass on the validity of same, direct the giving of notices to interested persons of hearings on disputed claims, conduct the necessary hearings,submit reports thereon and in general supervise the administration of the Judgment and decide all disputed questions of law and fact connected therewith subject to confirmation by the Court; all expenses incurred by the Special Master, including his fee, shall be paid out of the Fund;...

My primary duty was to identify and locate the holders of $1,544,300 of debentures who constituted the class of non-converting debentureholders eligible to participate in the Judgment Fund. That task was not an easy one since the debentures were unregistered. However, Chase had kept a record in the form of redemption slips which showed that after March 29, 1966, $1,320,000 in debentures had been redeemed. Presumably, $224,300 in debentures were still outstanding.

With Court approval Chase was retained by me to assist in the administration and distribution of the Judgment Fund. From the redemption slips which contained the (i) name and address of the person or firm who submitted each debenture for

redemption, (ii) serial number of every debenture, (iii) date of redemption and (iv) amount remitted in payment, a Master List was prepared. Names and addresses supplied by Counsel for the parties as well as those of persons who had corresponded with Chase concerning the debentures were added to the Master List. All but a relatively few of the redemptions occurred in the remaining months of 1966 and early part of 1967. Of those the majority were by banks and brokerage houses, acting on behalf of their clients whose names and addresses with few exceptions, were not disclosed.

In March 1978 Notices and Proofs of Claim were mailed to those whose names and addresses appeared on the Master List.

A separate notice was also sent to banks and brokerage firms on the Master List requesting them to transmit copies of the Notice and Proof of Claim to their clients. Simultaneously, a Notice was published once a week for three consecutive weeks in the New York Times and the Wall Street Journal (National Edition). Proofs of Claim were to be filed no later than September 1, 1978.

On July 20, 1978 I served and filed a Petition with the United States District Court for the Southern District of New York requesting that an Order be entered extending the time for filing Proofs of Claim to March 1, 1979. At that time there was then pending before the United States Court of Appeals for the Second

Circuit a petition for en banc reconsideration of a panel decision which precluded recovery of Respondents' attorneys' fees and expenses from the unclaimed portion of the Judgment Fund. Until that issue was determined and the amount thereof fixed by Court order there could be no distribution of the Judgment Fund. More importantly, additional time was needed to identify and locate debentureholders, since by July 15, 1978 only Proofs of Claim accounting for $290,000 in debentures had been filed. The Court granted my petition and the time for filing Proofs of Claim was extended to March 1, 1979.

Redemptions effected by banks and brokerage houses was and remains the main

problem. Their customers account for nearly all of the debentureholders who have not been identified or located. Trying to identify their clients was impeded by the fact that records were not kept going back to 1966 and 1967. Moreover, during that span of time many brokerage firms ceased doing business, and like several banks, merged or were acquired by other institutions. New York City banks acted, in the main, on behalf of correspondent banks throughout the country.

In depth research of the files at Chase aided by the finding of the actual debentures redeemed after March 29, 1966 led to the discovery of additional debentureholders. Boeing lent its assis-

tance by publishing a Notice in its quarterly report to stockholders. With court approval a professional search firm was hired to locate those to whom Notices and Proofs of Claim were sent but returned as undeliverable by the Postal Service. Both by mail and telephone those debentureholders who failed to file Proofs of Claim were urged to do so. Where possible, banks and brokerage firms were furnished with copies of communications with Chase as an aid in their search efforts.

As a consequence of the foregoing, the number of claims filed increased significantly and justified a further extension of time for filing Proofs of Claim to September 1, 1979. At the same time

the issue of the allocation of Respondents' counsel fees and expenses was still before the Court thereby barring a distribution of the Judgment Fund. The same factors would justify additional time being granted for the filing of Proofs of Claim.

As of July 18, 1979 Proofs of Claim accounting for $706,600 in debentures have been filed and processed. Of this amount, $33,200 in debentures are awaiting additional information or documentation in support of the Proofs of Claim presented. Although identified and located, persons representing $128,700 in debentures still have not filed Proofs of Claim. Returns by the Postal Service amount to $84,000 in debentures. Unidentified debenture-

holders who redeemed through brokerage firms and banks represent $593,600 in debentures. $31,200 face amount of debentures are still outstanding.

Dated: New York, New York
July 19, 1979

Respectfully submitted,

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